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# Lost Constitutional Moorings: Recovering the War Power

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# Lost Constitutional Moorings: Recovering the War Power

LOUIS FISHER\*

*For the past half century, Presidents have claimed constitutional authority to take the country from a state of peace to a state of war against another nation. That was precisely the power that the Framers denied to the President and vested exclusively in Congress. That allocation of power was understood by all three branches until President Harry Truman went to war against North Korea in 1950. He never came to Congress for authority before he acted or at any time thereafter. Similar false claims of authority have been made by Presidents since that time. These constitutional violations have been assisted by members of Congress, federal judges, academics, law reviews, and the media. These institutional failings have done great damage to the U.S. constitutional system, separation of powers, checks and balances, the principle of self-government, and public participation—the very values that the United States says that it wants to export to other countries.*

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## INTRODUCTION

The initiation of U.S. military operations in Iraq flowed from a long list of miscalculations, false claims, and misjudgments, both legal and political. Errors of that magnitude were not necessary or inevitable. Military conflict could have been delayed, perhaps permanently, had the responsible political leaders performed their constitutional duties with greater care, reflection, integrity, and commitment to constitutional principles. Adding to the failures of elected officials were decades of irresponsible and misinformed statements by federal judges, academics, law reviews, and the media.

Although the Iraq War that began in 2003 was orchestrated by the Republican Party and the Bush administration, their miscalculations built upon a half century of violations of constitutional principles over the war power. Democratic Presidents led the country to war against North Korea (President Harry Truman), North Vietnam (President Lyndon Johnson), and Serbia (President Bill Clinton). Republican neoconservatives beat the drums for war against Iraq, but Democratic academics did the same for Korea. The dominant theme in American foreign policy since World War II has been a bellicose spirit that champions the use of military force, boasts the virtues of “American exceptionalism,” stands ready to fight “evil” anywhere (whether Soviet Communism or Islamic fundamentalism), and regularly attacks opponents of war as unpatriotic and unmanly. That these forces led to torture by U.S. soldiers at Abu Ghraib or CIA “black sites” should come as no surprise. They are the natural results of concentrated power, political arrogance, and ideological fervor.

Part I describes the constitutional framework developed by the American Framers, rejecting the British executive-centered war model and vesting in Congress the authority to take the country from a state of peace to a state of war against another country. Part II covers the record of military activities from 1789 to 1950, a period that generally adhered to the framers’ design. Part III explains the major steps that have helped undermine the Constitution, including the United Nations Charter, the Korean War in 1950, the Gulf of Tonkin Resolution in 1964, the Kosovo War in 1999, and the second Iraq War in 2003. Part IV analyzes the factors that have contributed to constitutional violations: presidential adventurism, a supine Congress, an acquiescent judiciary, academic writings, and misconceptions promoted by the media. Part V looks at how neoconservatives, Leo Strauss, the Federalist Society, and John Yoo contributed to a more muscular U.S. foreign policy. Part VI concentrates on particular errors and misconceptions that led to U.S. involvement in the second Iraq War.

## I. THE CONSTITUTIONAL FRAMEWORK

Given the dominant power of Presidents over the past half century and their commitment to military action, it may seem that the U.S. Constitution supports their authority to go to war. It does not. The Constitution was intended to *prohibit* presidential wars. That point becomes clear by examining the framers’ rejection of the

British war model, the express language of the Constitution, statements by framers, and the consensus among all three branches that only Congress could commit the nation to war against another country.

### A. British Precedents

British legal principles assigned all external affairs to the King, including the power to initiate war. Although the framers borrowed heavily from British law, they repudiated the war model in full, transferring that power to the legislative branch as an essential step in creating a republican form of government. Self-government meant that the people, through their elected representatives, would decide when to change the country's relationship with another country from a state of peace to a state of war. What is striking over the past half century is the extent to which elected officials, federal judges, academics, and the media are willing to place in the President the monarchical powers that the Framers had so systematically rejected.

The English Parliament gained the power of the purse in the 1660s to control executive ambitions, but the power to initiate war remained a monarchical prerogative. John Locke's *Second Treatise on Civil Government* spoke of separating government into three branches: legislative, executive, and "federative." The last consisted of "the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth[.]" The federative power (or what we call foreign policy) was "always almost united" with the executive. Separating the executive and federative powers, Locke warned, would invite "disorder and ruin."<sup>1</sup>

Fully consistent with that model were the writings of Sir William Blackstone, the great eighteenth-century jurist. He defined the King's prerogative as "those rights and capacities which the [K]ing enjoys alone."<sup>2</sup> He considered some of the prerogatives as *direct*: those "rooted in and spring[ing] from the [K]ing's political person," including the right to send and receive ambassadors and the power to make "war or peace."<sup>3</sup> Individuals entering society placed in the King the sole prerogative to make war and surrendered the private right to make war: "It would, indeed, be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war."<sup>4</sup>

The prerogative allowed the King to make "a treaty with a foreign state, which shall irrevocably bind the nation."<sup>5</sup> The King could issue letters of marque (authorizing private citizens to undertake military actions) and reprisal (small wars). As Blackstone explained, that prerogative was "nearly related to, and plainly derived from, that other of making war."<sup>6</sup> Blackstone described the King as "the generalissimo, or the first in military command," who had "the sole power of raising and regulating fleets and armies."<sup>7</sup> Whenever the King exercised his lawful prerogative he "[was], and ought to

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1. JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT*, §§ 146–48 (J.W. Gough ed., Basil Blackwell Oxford 3d ed. 1966) (1690).

2. WILLIAM BLACKSTONE, 2 *COMMENTARIES* \*238.

3. *Id.* at \*240.

4. *Id.* at \*257.

5. *Id.* at \*252.

6. *Id.* at \*258.

7. *Id.* at \*262.

be absolute; that is, so far absolute, that there [was] no legal authority than [could] either delay or resist him."<sup>8</sup>

### *B. The American Model*

Scrutinize the U.S. Constitution as carefully as you like and you will not find a single one of Blackstone's prerogatives assigned to the President. The powers to declare war, raise armies and navies, and issue letters of marque and reprisal are placed exclusively in Congress. The powers to make treaties and appoint ambassadors are shared between the President and the Senate. Thomas Jefferson expressed his satisfaction with this division of power: "We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."<sup>9</sup>

The Framers rejected the British model because of their strong commitment to a republic, with citizens depending on their elected representatives and a system of one branch checking another. To assure public control, the decision to go to war against another country was vested in Congress, the branch closest to the people. At the Philadelphia Convention in 1787, where the delegates assembled to draft the Constitution, the monarchical model was rejected whenever it was raised. Charles Pinckney said he was "for a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one."<sup>10</sup> John Rutledge wanted the executive power placed in a single person, "tho' he was not for giving him the power of war and peace."<sup>11</sup> James Wilson also preferred a single executive but "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c."<sup>12</sup>

Edmund Randolph worried about executive power, calling it "the foetus of monarchy."<sup>13</sup> The delegates at the Philadelphia convention, he said, had "no motive to be governed by the British Governm[ent] as our prototype."<sup>14</sup> If the United States had no other choice he might adopt the British model, but "the fixt genius of the people of America required a different form of Government."<sup>15</sup> Wilson agreed that the British model "was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it."<sup>16</sup>

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8. *Id.* at \*250.

9. 15 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 397 (Julian P. Boyd ed., 1958).

10. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64-65 (Max Farrand ed., 1937).

11. *Id.* at 65.

12. *Id.* at 65-66.

13. *Id.* at 66.

14. *Id.*

15. *Id.*

16. *Id.*

One might expect to find Blackstone's prerogative championed by Alexander Hamilton, but that is not the case. In a lengthy speech delivered on June 18, Hamilton set forth his principles of government and explained why the British model of executive monopoly over foreign affairs and the war power had no home in America. In his "private opinion he had no scruple in declaring . . . that the British Gov[ernment] was the best in the world[.]"<sup>17</sup> but monarchical powers did not mix with republican government. The American President would have "with the advice and approbation of the Senate" the power of making treaties, the Senate would have the "sole power of declaring war," and the President would be authorized to have "the direction of war when authorized or begun."<sup>18</sup>

The one area of the war power that the Framers assigned to the President, to be taken on his initiative, was of a defensive nature. The early draft empowered Congress to "make war." Charles Pinckney objected that legislative proceedings "were too slow" for the safety of the country in an emergency, since he expected Congress to meet but once a year for short periods.<sup>19</sup> James Madison and Elbridge Gerry moved to insert "declare" for "make," leaving to the President "the power to repel sudden attacks."<sup>20</sup> Their motion carried on a vote of seven to two. After Rufus King explained that the word "make" would allow the President to conduct war, which was "an Executive function," Connecticut changed its vote and the final tally became eight to one.<sup>21</sup>

Debate on the Madison-Gerry amendment underscored the narrow grant of authority to the President. Pierce Butler wanted to give the President the power to make war, arguing that he "will have all the requisite qualities, and will not make war but when the Nation will support it."<sup>22</sup> Not a single delegate supported Butler. Roger Sherman insisted that the President should be able "to repel and not to commence war."<sup>23</sup> Gerry said he "never expected to hear in a republic a motion to empower the Executive alone to declare war."<sup>24</sup> George Mason spoke "[against] giving the power of war to the Executive, because not <safely> to be trusted with it; . . . He was for clogging rather than facilitating war."<sup>25</sup> In the Pennsylvania ratifying convention, James Wilson voiced the prevailing confidence that the American system of checks and balances "will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large[.]"<sup>26</sup>

Under Article II of the Constitution, Presidents have the title commander in chief. Unlike the interpretations offered by some advocates of executive power, this title never gave the President the authority to take the country to war. Instead, it was limited

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17. *Id.* at 288.

18. *Id.* at 292.

19. 2 *id.* at 318.

20. *Id.* at 319.

21. *Id.* at 319.

22. *Id.* at 318.

23. *Id.*

24. *Id.*

25. *Id.* at 319. For further details on the framers' intent on the war power, see LOUIS FISHER, *PRESIDENTIAL WAR POWER* 1–16 (2d ed. 2004).

26. 2 *DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 528 (Jonathan Elliot ed., 1836).

to two purposes. One was to promote unity of command. The framers wanted the accountability that comes with a single person in charge of military operations. In Federalist No. 74, Hamilton explained that "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."<sup>27</sup> The second purpose was to assure civilian supremacy. In time of war, control was not to be transferred to generals and admirals. Whatever soldier leads U.S. armies to victory against an enemy, "he is subject to the orders of the *civil magistrate*, and he and his army are always 'subordinate to the civil power.'"<sup>28</sup>

Nothing in the Commander in Chief Clause contemplated that Presidents may initiate offensive wars against other nations. In the *Steel Seizure* case of 1952, Justice Robert Jackson noted that the Commander in Chief Clause is sometimes put forth "as support for any Presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with army or navy."<sup>29</sup> To this proposition he said that nothing would be "more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."<sup>30</sup>

### C. Executive Ambition for Fame

Why did George Mason say that it was not "safe" to trust the President with the war power? That understanding came from studying other governments and the many disastrous wars initiated by kings and monarchs. The Framers understood that executives, in their search for fame and glory, had a dangerous appetite for war.<sup>31</sup> John Jay, whose political experience lay with foreign affairs and executive duties and who served as the first Chief Justice of the Supreme Court, warned in Federalist No. 4 that "nations in general will make war whenever they have a prospect of getting anything by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people."<sup>32</sup>

The framers underscored their concerns about presidential wars. In 1793, James Madison called war "the true nurse of executive aggrandizement. . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive

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27. THE FEDERALIST NO. 74, at 473 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

28. 10 Op. Att'y Gen. 79 (1861) (emphasis in original).

29. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 641-42 (1952).

30. *Id.* at 642.

31. See generally William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997) (discussing the framers' view of the role of ambition in the separation of war powers).

32. THE FEDERALIST NO. 4, at 101 (John Jay) (Benjamin Fletcher Wright ed., 1961).

patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.”<sup>33</sup> Five years later, in a letter to Jefferson, Madison emphasized that the Constitution “supposes, what the History of all Gov[ermen]ts demonstrates, that the Ex[ecutive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legis[ature].”<sup>34</sup>

Also in 1793, writing under the pseudonym “Helvidius,” Madison insisted on keeping the power of commander in chief at arm’s length from the power to take the nation to war: “Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought to be commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.”<sup>35</sup>

Those who advocate strong presidential powers usually look to Hamilton for support. However, Hamilton shared with the other framers the understanding that the decision to go to war was vested in Congress, not the President. In his “Pacifcus” writings in 1793, Hamilton wrote that the President was to keep the peace and Congress had the exclusive authority to make war: “While, therefore, the Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility, it belongs to the ‘executive power’ to do whatever else the law of nations, co-operating with the treaties of the country, enjoin in the intercourse of the United States with foreign Powers.” Hamilton found in this distribution of authority “the wisdom” of the Constitution. “It is the province and duty of the executive to preserve to the nation the blessings of peace. The Legislature alone can interrupt them by placing the nation in a state of war.”<sup>36</sup>

Joseph Story, who served on the Supreme Court from 1811 to 1845, wrote about the essential republican principle of vesting in the representative branch the decision to go to war:

[T]he power of declaring war is not only the highest sovereign prerogative; . . . it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nations. War, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity, and not infrequently the existence, of a nation. It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead; . . . It should therefore be difficult in a republic to declare war; but not to make peace. . . . The

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33. 6 JAMES MADISON, THE WRITINGS OF JAMES MADISON 174 (Gaillard Hunt ed., 1906).

34. *Id.* at 312.

35. *Id.* at 148 (emphasis in original).

36. Pacifcus, GAZETTE OF THE U.S., Jun. 29, 1793, reprinted in 4 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 443 (Henry Cabot Lodge ed., 1904).



co-operation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation[.]<sup>37</sup>

These principles, elementary to the framers and their successors, are rarely understood today by elected officials, federal judges, academics, the media, or the general public. The insistence on legislative deliberation and authorization has been made subordinate to the supposed need for prompt presidential action. Even the concept of "a republic" has been largely lost in public and private discourse, although we see the word—but not its meaning—in the Pledge of Allegiance: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands . . ." What is essential is not the flag but what it stands for: a republic. Lose the republic and the flag stands for nothing.

#### *D. Scholarly Treatment*

Scholars of the war power generally agree that the framers broke decisively with the British model and vested in Congress the exclusive power to initiate hostilities against another country. Taylor Reveley, writing in 1981, concluded that if you asked a man in the state of nature to read the war powers provisions in the U.S. Constitution and to compare them to governmental practices after 1789, "he would marvel at how much Presidents have spun out of so little. On its face, the text tilts decisively toward Congress."<sup>38</sup> Charles Lofgren, in a 1986 study, said that the constitutional grants of power to the legislative branch "likely convinced contemporaries even further that the new Congress would have nearly complete authority over the commencement of war."<sup>39</sup>

In 1993, John Hart Ely published a major work on the record of Congress in the Vietnam War. He said that when academics try to divine the "original understanding" of the Constitution, the results "can be obscure to the point of inscrutability," but when the dispute narrows to the war power, all wars—big or little, declared or undeclared—"had to be legislatively authorized."<sup>40</sup> To David Gray Adler, the Constitution "makes Congress the sole and exclusive repository of the ultimate foreign relations power—the authority to initiate war."<sup>41</sup> In their writings, both Michael Glennon and Harold Koh rejected the notion that the President had any constitutional authority to take the country from a state of peace to a state of war. The President's independent powers were of a defensive, not an offensive, nature.<sup>42</sup>

37. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 60–61 (1833).

38. W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 29 (1981).

39. CHARLES A. LOFGREN, GOVERNMENT FROM REFLECTION AND CHOICE: CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 36 (1986).

40. JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3 (1993).

41. David Gray Adler, *Courts, Constitution, and Foreign Affairs*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19 (David Gray Adler & Larry N. George eds., 1996).

42. See MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 81 (1990); HAROLD HONGJU

The scholar most identified with the President's independent power to initiate war is John Yoo, who argued in a 1996 law review article that the framers constructed a constitutional system that "encourage[d] presidential initiative in war[.]"<sup>43</sup> He claimed that the framers did not break with the British model of the war power "but instead followed in their footsteps."<sup>44</sup> Moreover, it was his position that in the area of the war power the courts "were to have no role at all."<sup>45</sup> Some of the problems with this analysis will be addressed in Part IV, but they are treated more fully in Parts V.B and V.C.

## II. MILITARY PRECEDENTS FROM 1789 TO 1950

The values promoted by the framers were honored for a century and a half. Presidents could take certain actions of a defensive nature—to repel sudden attacks—but any offensive action against another country required congressional deliberation, judgment, and statutory approval. Writing in 1793, President George Washington said that any offensive operations against the Creek Nation must await congressional action: "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject, and authorized such a measure."<sup>46</sup> His Secretary of War, Timothy Pickering, informed Governor William Blount that Congress had decided to avoid war with the Creeks: "Congress alone are competent to decide upon an offensive war, and congress have not thought fit to authorize it."<sup>47</sup>

The standard here for internal wars against Native Americans applied fully to wars against outside nations. When President John Adams decided it was necessary to use military force against France in 1798, he submitted the matter to Congress and awaited statutory authority.<sup>48</sup> Similarly, President Jefferson took certain military actions against the Barbary pirates in the Mediterranean, in 1801, but later reported to Congress that he was "[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense."<sup>49</sup> When conflicts arose between the United States and Spain four years later, he said that "Congress alone is constitutionally invested with the power of changing our condition from peace to war."<sup>50</sup>

Federal courts had the same understanding about the war power. In 1801, Chief Justice John Marshall observed: "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to

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KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 75–76 (1990).

43. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174 (1996).

44. *Id.* at 197.

45. *Id.* at 170.

46. Letter from George Washington to Governor William Moultrie (Aug. 28, 1793), in 33 GEORGE WASHINGTON, *THE WRITINGS OF GEORGE WASHINGTON* 73 (John C. Fitzpatrick ed., 1931–44).

47. 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 389 (Clarence Edwin Carter ed., 1936).

48. FISHER, *supra* note 25, at 23–24.

49. 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 315 (James D. Richardson ed., 1897) [hereinafter Richardson].

50. 15 ANNALS OF CONG. 19 (1805).

as our guides in this inquiry.”<sup>51</sup> *That body alone.* A federal circuit court in 1806 repudiated the idea that the President could authorize military adventures abroad: “[I]t is the exclusive province of congress to change a state of peace into a state of war.”<sup>52</sup> *Exclusive.* As President James Polk did with Mexico, Presidents could move U.S. troops into disputed territories to provoke military action, but Polk never claimed that he could go to war on his own. He needed to come to Congress, which could decide that war was necessary or that non-military, diplomatic options should be pursued. Congress opted for war.<sup>53</sup> That choice lay with the legislative, not the executive, branch.

All three branches understood that only Congress could authorize war against another nation. In 1863, the Supreme Court upheld a blockade that President Abraham Lincoln had placed on the South during the Civil War. Justice Robert Grier emphasized that the President as commander in chief “has no power to initiate or declare a war either against a foreign nation or a domestic State.”<sup>54</sup> During oral argument, the attorney representing the White House took exactly the same position. Richard Henry Dana, Jr. conceded that Lincoln’s action had nothing to do with “the right to initiate a war, as a voluntary act of sovereignty. That is vested only in Congress.”<sup>55</sup>

On many occasions, from 1789 to 1950, Presidents used military force abroad without first coming to Congress to seek authority. None of those actions, however, amounted to a major war. Edward S. Corwin, an eminent constitutional scholar, said that the list of those presidential initiatives consisted largely of “fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like.”<sup>56</sup> Respect for constitutional principles ended in 1950 when President Harry Truman took the country to war against North Korea without ever coming to Congress, either before or after. Corwin would rebuke his academic colleagues for their careless endorsement of the legality of the Korean War and their willingness to defend the “high-flying prerogative” of presidential power.<sup>57</sup>

### III. STEPS IN UNDERMINING THE CONSTITUTION

On June 26, 1950, President Harry Truman announced that the United Nations Security Council had ordered North Korea to withdraw its forces from South Korea and to return to a position north of the thirty-eighth parallel.<sup>58</sup> After North Korea failed to comply, he ordered U.S. air and sea forces to provide support to South Korea. He explained that the United States “will continue to uphold the rule of law.”<sup>59</sup> In fact,

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51. *Talbot v. Seeman*, 5 U.S. 1, 28 (1801).

52. *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).

53. See FISHER, *supra* note 25, at 39–42.

54. *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862).

55. *Id.* at 660 (emphasis in original).

56. Edward S. Corwin, *The President's Power*, NEW REPUBLIC, Jan. 29, 1951, at 16.

57. See *infra* Part IV.D.

58. Statement by the President on the Violation of the 38th Parallel in Korea, PUB. PAPERS 491 (June 26, 1950).

59. Statement by the President on the Situation in Korea, PUB. PAPERS 492 (June 27, 1950).

Truman violated the U.S. Constitution, a congressional statute, the U.N. Charter, and his own public promises.

#### *A. The U.N. Charter*

In 1945, during debate on the U.N. Charter, Senators considered language that called for member states to enter into “special agreements” when sending armed forces and equipment to the U.N. for collective military action.<sup>60</sup> To encourage the Senate to pass the Charter, Truman wired this note from Potsdam: “When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them.”<sup>61</sup> With those words, Truman pledged to come to Congress in advance and seek statutory authority rather than attempt to act unilaterally. This part of the Charter had been highly controversial. It was well known to the drafters of the U.N. Charter that the United States, after World War I, failed to join the League of Nations because President Woodrow Wilson refused to accept a Senate amendment that insisted on the constitutional authority of Congress to initiate war.<sup>62</sup> Wilson had no substantial objections to the amendment. It was more of a personal confrontation with Senator Henry Cabot Lodge. On March 8, 1920, Wilson wrote to Senator Gilbert Monell Hitchcock (D-Neb.) that “Congress alone can declare war or determine the causes or occasions for war, and that it alone can authorize the use of the armed forces of the United States on land or on the sea.”<sup>63</sup>

Assured by Truman that he understood and respected the war prerogatives of Congress, the Senate ratified the U.N. Charter. Article 43 provided that all U.N. members shall make available to the Security Council, in accordance with special agreements, armed forces and other assistance.<sup>64</sup> Each nation would ratify those agreements “in accordance with their respective constitutional processes.”<sup>65</sup> It then became the obligation of Congress to pass legislation to define the constitutional processes of the United States. Section 6 of the U.N. Participation Act of 1945 states with singular clarity that the special agreements “shall be subject to the approval of the Congress by appropriate Act or joint resolution.”<sup>66</sup> The procedure was specific and clear. Both branches knew what the Constitution required. The President would first have to obtain the approval of Congress.

#### *B. The Korean War*

Nevertheless, five years later Truman ordered U.S. troops to Korea without coming to Congress for authority, either in advance of the crisis or afterward. How could Truman violate his own pledge from Potsdam and the explicit language of the U.N.

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60. FISHER, *supra* note 25, at 86–90.

61. 91 CONG. REC. 8185 (1945).

62. FISHER, *supra* note 25, at 81–84.

63. 65 THE PAPERS OF WOODROW WILSON 68 (Arthur S. Link ed., 1991).

64. 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776–1949, at 1164 (Charles I. Bevans ed., 1968).

65. *Id.*

66. United Nations Participation Act of 1945, Pub. L. No. 79-264, § 6, 59 Stat. 619, 621 (1945).

Participation Act? The short, highly legalistic answer: there was no "special agreement." There never has been a special agreement. The very procedure selected to maintain legislative control and to assure compliance with the Constitution became a nullity. Even with this evasive maneuver, Truman claimed to be operating under U.N. authority. His Secretary of State, Dean Acheson, stated that the Truman administration had done its "utmost to uphold the sanctity of the Charter of the United Nations and the rule of law," and that the administration was in "conformity with the resolutions of the Security Council of June 25 and June 27, giving air and sea support to the troops of the Korean government."<sup>67</sup> The historical record is to the contrary. Truman committed U.S. forces before the Council called for military action. In his memoirs, Acheson admitted that "some American action, said to be in support of the resolution of June 27, was in fact ordered, and possibly taken, prior to the resolution."<sup>68</sup> Acheson never explained how Truman could do his "utmost" without coming to Congress in advance for authority or at least coming afterward.

Korea was the first unconstitutional presidential war because it entirely skirted Congress. What the Truman administration essentially argued is that the President and the Senate, through the treaty process (the U.N. Charter), could create an alternative means of going to war. Instead of coming to Congress to receive authority in advance from both Houses, the President could entirely circumvent Congress and go to an international body for "authority." To accept that reasoning, one would have to argue that the President and the Senate could eliminate the war prerogatives of the House of Representatives, the legislative body closest to the people.

### *C. The Gulf of Tonkin Resolution*

As John Jay warned, presidential wars have often been advanced for partisan and personal reasons, not for the interests of the people. When President Lyndon B. Johnson decided to escalate the war in Vietnam, he knew that Southeast Asia was the last place to be and that an American victory was unlikely.<sup>69</sup> Yet he worried that Republicans would exploit any sign of weakness on his part. With great misgivings, he deepened U.S. involvement to avoid appearing "soft on Communism."<sup>70</sup> Instead of formulating an effective plan for the national interest, he pursued "his own political fortunes" and chose to lie "in the pursuit of self-interest."<sup>71</sup> What Johnson promoted as being in the national interest led to presidential deception, misrepresentation, distortion, gross understatements, and outright lies.<sup>72</sup>

The most blatant misrepresentation was the "second attack" in the Gulf of Tonkin on August 4, 1964 that never occurred. President Johnson called the two attacks, one

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67. 23 DEP'T ST. BULL. 46 (1950).

68. DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* 407-08 (1969).

69. *See* FISHER, *supra* note 25, at 133.

70. *See* TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES, 1963-1964, at 88, 95, 213-14, 370, 380 (Michael R. Beschloss ed., 1997); 110 CONG. REC. 18,549 (1964) (statement by Rep. Fascell).

71. *See* H. R. MCMASTER, *DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT MCNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM* 333-34 (1997).

72. *Id.* at 330.

on August 2 and the other on August 4, “unprovoked.”<sup>73</sup> In fact, the United States had helped provide support for South Vietnamese attacks on North Vietnam.<sup>74</sup> A study for the National Security Agency, made public in 2005, concluded that the NSA had made mistakes in interpreting North Vietnamese intercepts and decided to conceal the errors rather than admit them. August 4 intercepts, thought to document a second attack, actually pertained to the August 2 attack.<sup>75</sup> The study of signals intelligence (SIGINT) concluded

that *no attack* happened that night. Through a compound of analytic errors and an unwillingness to consider contrary evidence, American SIGINT elements in the region and at NSA HQs reported Hanoi’s plans to attack the two ships of the Desoto patrol. Further analytic errors and an obscuring of other information led to publication of more “evidence.” In truth, Hanoi’s navy was engaged in nothing that night but the salvage of two of the boats damaged on 2 August.<sup>76</sup>

The Johnson administration received only SIGINT “that supported the claim that the communists had attacked the two destroyers.” Ninety percent of all available SIGINT was withheld from the administration, including information about North Vietnamese salvage operations of the torpedo boats damaged on August 2.<sup>77</sup> On August 4, the two U.S. vessels, the *Maddox* and the *Turner Joy*, made “wild evasive maneuvers” to avoid torpedoes they thought that North Vietnamese patrol boats had launched, and the sharp movements by the U.S. ships produced sonar reports of more torpedoes.<sup>78</sup> In the end, a handful of ambiguous SIGINT messages were used to support the administration’s decision to take military action. Conflicting or unsupportive SIGINT messages were withheld from the administration. NSA personnel “believed that the attack happened and rationalized the contradictory evidence away.”<sup>79</sup>

#### D. Kosovo War

After the Korean War, the second unconstitutional presidential war occurred in Kosovo, in 1999, when President Bill Clinton went to war not on the basis of a Security Council resolution (which he could not get) but with the backing of NATO countries.<sup>80</sup> At a news conference on October 8, 1998, he stated: “Yesterday I decided that the United States would vote to give NATO the authority to carry out military

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73. Remarks at Syracuse University on the Communist Challenge in Southeast Asia, 2 PUB. PAPERS 928 (Aug. 5, 1964).

74. FISHER, *supra* note 25, at 129–33.

75. Robert J. Hanyok, *Skunks, Bogies, Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery, 2–4 August 1964*, CRYPTOLOGIC Q., 2001, at 2 (originally published in top secret format but declassified on November 3, 2005 and made available through the NSA Web site: <http://www.nsa.gov/vietnam/index.cfm>).

76. *Id.* at 3 (emphasis in original).

77. *Id.*

78. *Id.* at 24.

79. *Id.* at 49; see also Scott Shane, *Doubts Cast on Vietnam Incident, But Secret Study Stays Classified*, N.Y. TIMES, Oct. 31, 2005, at A1; Scott Shane, *Vietnam War Intelligence ‘Deliberately Skewed,’ Secret Study Says*, N.Y. TIMES, Dec. 2, 2005, at A11.

80. FISHER, *supra* note 25, at 198–99.

strikes against Serbia if President Milosovic continues to defy the international community.”<sup>81</sup> The language is remarkable. First: “I decided.” There would be no deliberation in Congress, no vote by lawmakers to grant authority. Clinton alone would decide America’s policy. The decision to go to war against another country rested in the hands of one person, exactly what the Framers thought they had rejected. Second, Clinton would be giving *NATO* authority, instead of Congress giving *the President* authority. Clinton’s argument is possibly even more far-fetched than Truman’s reliance on a Security Council resolution. Clinton said he did not need the support of Congress but he did need the support of Italy, Belgium, and other NATO members. The argument is wholly untenable. This theory would allow the President to run around Congress and obtain “authority” from either an international organization (the U.N.) or a regional body (NATO).<sup>82</sup>

### *E. The Second Iraq War*

The third unconstitutional presidential war is the current war against Iraq. It may seem constitutional in the sense that President Bush received statutory authority from Congress in October 2002.<sup>83</sup> However, Congress did not satisfy its constitutional obligation to *decide* on war. The statute contained a grab bag of policy objectives. It supported U.S. diplomatic efforts.<sup>84</sup> In reporting out the legislation, the House Committee on International Relations argued that passage of the resolution could help prevent war:

The Committee hopes that the use of military force can be avoided. It believes, however, that providing the President with the authority he needs to use force is the best way to avoid its use. A signal of our Nation’s seriousness of purpose and its willingness to use force may yet persuade Iraq to meet its international obligations, and is the best way to persuade members of the Security Council and others in the international community to join us in bringing pressure on Iraq or, if required, in using armed force against it.<sup>85</sup>

The resolution helped bring pressure on the Security Council to send inspectors into Iraq to search for weapons of mass destruction. They found nothing. As to whether war should or should not occur, the committee washed its hands. By passing legislation that allowed the President to make that decision, Congress transferred a primary constitutional duty from the legislative branch to the executive branch. That is precisely what the Framers fought against.

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81. Remarks on the Decision of Certain Health Maintenance Organizations to Opt Out of Some Medicare Markets, 2 PUB. PAPERS 1765 (Oct. 8, 1998).

82. Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1237 (1997).

83. Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

84. *Id.* § 2, at 1501.

85. H.R. REP. NO. 107-721, at 4–5 (2002).

## IV. WHO ABETS CONSTITUTIONAL VIOLATIONS?

There are many reasons why the original constitutional design of keeping the war power with Congress has been undermined and violated. The main reason is presidential adventurism and disrespect for constitutional boundaries. However, Presidents could not have succeeded without the help of a supine Congress, a federal judiciary that fell inactive beginning with the Vietnam War, academic writings, and misconceptions promoted by the media. Added to this mix are the contributions of the neoconservatives, the Federalist Society, and the writings of John Yoo. This Part analyzes these influences and how they set the stage for the legal and political fallacies of the second Iraq War.

*A. Members of Congress*

The Framers understood that draft constitutional language, by itself, would not keep the branches of government separate. As James Madison warned, mere text would provide “parchment barriers” easily circumvented by aggressive political actors.<sup>86</sup> Political power had an encroaching spirit that would not be deterred by constitutional language. Madison put his trust in checks and balances: “[A]s all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”<sup>87</sup> Each branch “should have a will of its own” to fight off encroachments and protect institutional powers.<sup>88</sup>

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.<sup>89</sup>

The executive and judicial branches have performed reasonably well in protecting their powers and even adding to them. Members of Congress, however, have progressively failed over the past half century to protect their prerogatives. They either fail to fight off encroachments or find ways to voluntarily surrender legislative powers to other branches.<sup>90</sup> Few lawmakers understand the constitutional duties of their institution or have an interest in protecting them. This absence of will and interest is particularly conspicuous in the area of the war power.

During House debate on the Gulf of Tonkin Resolution, no Representative opposed the legislation or attempted to place any constraint on military initiatives by President Johnson. The House Majority Leader, Carl Albert (D-Okla.), emphasized the need to

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86. THE FEDERALIST NO. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961).

87. THE FEDERALIST NO. 51, at 355 (James Madison) (Benjamin Fletcher Wright ed., 1961).

88. *Id.*

89. *Id.* at 356.

90. LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING (2000).



set aside party differences and unite behind the President. The House Minority Leader, Charles Halleck (R-Ind.), took exactly the same position. Edwin Adair (R-Ind.) disagreed that congressional approval of the resolution would signal that legislators were “abdicating our congressional rights and our congressional responsibilities with respect to the declaration of war and with respect to foreign affairs generally.” He said that issue had been raised in committee, “and we were given assurance that it was the attitude of the Executive that such was not the case, that we are not impairing our congressional prerogatives.”<sup>91</sup> That statement alone, of course, marked an abdication. Lawmakers are not supposed to turn to executive officials to be assured that congressional prerogatives are being protected.

Senator J. William Fulbright (D-Ark.), chairman of the Senate Foreign Relations Committee, acted more like an executive official than a lawmaker. Fulbright knew that it was a mistake to commit U.S. troops to Vietnam. In a conversation with President Johnson on December 2, 1963, Fulbright made it plain that a military victory was out of the question:

I just think [Vietnam] is a *hell* of a situation. It involves a lot more talk, but I'll be goddamned if I don't think it is hopeless. . . . I think the whole general situation is against us, as far as a real victory goes. . . . [Y]ou don't want to send a whole lot more men in there, I think.<sup>92</sup>

Yet when Johnson wanted Fulbright to manage the Gulf of Tonkin Resolution, Fulbright did so loyally, showing more support for executive power than for legislative prerogatives or constitutional requirements.

The Vietnam commitment continued to expand because many lawmakers with strong reservations about military intervention refused to express their misgivings in public or to take a stand against Johnson. A prime example is Senator Richard Russell (D-Ga.), the powerful chairman of the Senate Armed Services Committee and an influential adviser to Johnson. Since the Eisenhower administration, Russell had warned about American involvement in Vietnam, but had put his weight on the side of presidential power rather than the Constitution. One scholar offered two reasons for keeping silent: “First, he had a misguided sense of what was respect for the president, and of the need to support the flag once committed. More important was his total lack of understanding of congressional responsibility in exercising power over the executive under Article I, § 8 of the Constitution.”<sup>93</sup>

During debate on the Iraq Resolution in October 2002, few legislators were ready to defend congressional prerogatives over war. Going to war is meant to be a serious enterprise, requiring consistency, clarity, coherence, and thoughtful deliberation. In an op-ed piece in the *Washington Post* on October 11, 2002, Michael Kinsley recognized that ambiguity can be useful in dealing with other nations. Sending mixed signals can keep an enemy off balance. Yet he concluded: “[T]he cloud of confusion that surrounds Bush's Iraq policy is not tactical. It's the real thing. And the dissembling is aimed at the American citizenry, not at Saddam Hussein.” Kinsley said that arguments

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91. 110 CONG. REC. 18,543 (1964).

92. TAKING CHARGE, *supra* note 70, at 88 (emphasis in original).

93. EZRA Y. SIFF, WHY THE SENATE SLEPT: THE GULF OF TONKIN RESOLUTION AND THE BEGINNING OF AMERICA'S VIETNAM WAR 56 (1999).

that “stumble into each other like drunks are not serious. Washington is abuzz with the ‘real reason’ this or that subgroup of the administration wants this war.”<sup>94</sup>

At no time before the vote on the Iraq Resolution did the Bush administration

make a persuasive, credible, or consistent case for war. Much of its rationale was exploded on a regular basis by the press. The campaign for war was dominated more by fear than facts, more by assertions of what might be, or could be, or used to be, than by what actually existed.<sup>95</sup>

The Democrats controlled the Senate in 2002 and could have blocked action on the resolution by objecting that the administration had failed to present adequate information to justify the war, and that much of the information it did present lacked credibility or substance. Democrats could have pointed to the first President Bush, who decided against a congressional vote in the election year of 1990. Instead, he came to Congress the following January, after the congressional elections, to seek legislative support.

Yet leading Democrats folded, one by one, looking less to constitutional requirements than to their own political calculations. Democrats, unable to develop a counterstrategy, appeared to favor a prompt vote on the Iraq Resolution to get that issue “off” the table. It was reported that Senator Tom Daschle (D-S.D.), the Majority Leader, hoped to expedite action on the resolution “to focus on his party’s core message highlighting economic distress before the November midterm elections.”<sup>96</sup> Senator John Edwards (D-N.C.) counseled quick action: “In a short period of time, Congress will have dealt with Iraq and we’ll be on to other issues.”<sup>97</sup>

This Democratic strategy smacked of a total lack of principle. Forget the merits of going to war, or examining the justifications for it. Just pass the resolution and draw attention to the party’s domestic agenda. The unconscionable nature of this bargain was noted by Senator Mark Dayton (D-Minn.). Trying to gain “political advantage in a midterm election is a shameful reason to hurry decisions of this magnitude.”<sup>98</sup> The second political drawback to this strategy was practical. Voting on the Iraq Resolution could never erase the White House’s advantage in controlling the elections, if not through action on the resolution then through ongoing, cliffhanging negotiations with the Security Council. Although some Democrats said they wanted to put the issue of the Iraq War behind them, it would always be in front.

There was little doubt that President Bush would receive the backing of Republicans for the Iraq Resolution. The question was the extent to which the Democrats would remain united in opposition. House Minority Leader Dick Gephardt (D-Mo.) broke ranks with many in his party when he announced support for a slightly redrafted resolution. He said: “We had to go through this, putting politics aside, so we

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94. Michael Kinsley, *War for Dummies*, WASH. POST, Oct. 11, 2002, at A37.

95. Louis Fisher, *Deciding on War Against Iraq: Institutional Failures*, 118 POL. SCI. Q. 389, 389 (2003).

96. David Firestone, *Liberals Object to Bush Policy on Iraq Attack*, N.Y. TIMES, Sept. 28, 2002, at A1.

97. Dana Milbank, *In President’s Speeches, Iraq Dominates, Economy Fades*, WASH. POST, Sept. 25, 2002, at A6.

98. Mark Dayton, *Go Slow on Iraq*, WASH. POST, Sept. 28, 2002, at A23.

have a chance to get a consensus that will lead the country in the right direction.”<sup>99</sup> There are multiple problems with this position. First, politics could not—and should not—be put aside. Gephardt’s interest in running for the presidency was well known. Was he announcing his support because he agreed with the merits of the war, or did he make the announcement to further his political ambitions by looking “strong on war”?

Second, the vote on the Iraq Resolution could never be anything other than a political decision, probably the most important congressional vote of the year. It inescapably called for political judgment. Lawmakers would be voting on whether to commit as much as \$100 billion or \$200 billion to a war stretching over a period of years. Their actions would stabilize or destabilize the Middle East, strengthen or weaken the war on terrorism, enhance or debase the nation’s prestige. Politics would always be present, as would partisan calculations and strategy.

After the House passed the Iraq Resolution, Senator Daschle announced his support. Although he suggested that Senators might “go back and tie down the language a little bit more if we can,” he insisted that “[w]e have got to support this effort. We have got to do it in an enthusiastic and bipartisan way.”<sup>100</sup> Placing trust in the President or calling for bipartisanship is not a substitute for the duty of a lawmaker to independently analyze the need for taking military force against another country. If a member of Congress decides to support a war enthusiastically, it needs to be on the merits after concluding that war is in the national interest. Daschle also said that “it is important for America to speak with one voice at this critical moment.”<sup>101</sup> The Framers counted on collective judgment, the deliberative process, and checks and balances. Those safeguards are lost when lawmakers decide to join with the President and subordinate their positions to his, all for the purpose of speaking with “one voice.” When legislators advocate one voice, it is the President’s.

During debate on the Department of Homeland Security, Senator Daschle said he intended “to give the President the benefit of the doubt.”<sup>102</sup> His Democratic colleague, Robert C. Byrd, took sharp exception: “I will not give the benefit of the doubt to the President. I will give the benefit of the doubt to the Constitution.”<sup>103</sup> Byrd watched the congressional debate drift from an initial willingness of lawmakers to analyze issues and weigh the merits to wholesale legislative abdication to the President. To Byrd, the fundamental question of why the United States should go to war was being replaced by “the mechanics of how best to wordsmith the president’s use-of-force resolution in order to give him virtually unchecked authority to commit the nation’s military to an unprovoked attack on a sovereign nation.”<sup>104</sup>

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99. *For Gephardt, Risks and a Crucial Role*, WASH. POST, Oct. 3, 2002, at A15.

100. John H. Cushman Jr., *Daschle Predicts Broad Support for Military Action Against Iraq*, N.Y. TIMES, Oct. 7, 2002, at A11 (alteration added).

101. Jim VandeHei & Juliet Eilperin, *Congress Passes Iraq Resolution*, WASH. POST, Oct. 11, 2002, at A1.

102. 148 CONG. REC. S9187 (daily ed. Sept. 25, 2002).

103. *Id.* at S9188.

104. Robert C. Byrd, Op-Ed., *Congress Must Resist the Rush to War*, N.Y. TIMES, Oct. 10, 2002, at A39.

*B. Legislative Party Leaders*

One would expect House and Senate party leaders to be schooled in the institutional values and traditions of their chambers, ready to do battle to resist encroachments by other branches. Those duties, of course, have to be weighed against the competing interests of the White House and the President's appeal for assistance on his political agenda. If the President is of the same party as the party leaders, they might be more inclined to accommodate executive interests. What has transpired, however, have been party leaders who regularly subordinate the interests of their branch to the political ambitions of a President. Surprisingly, that even includes party leaders who face a White House controlled by the other party.

*1. The Korean War*

Consider first the statements of Senator Scott Lucas (D-Ill.), Senate leader for the Democrats when President Truman decided to use military force against North Korea. Truman did not seek the approval of members of Congress. As Secretary of State Dean Acheson suggested, he might have wished only to "tell them what had been decided."<sup>105</sup> Truman met with congressional leaders at 11:30 a.m. on June 27, after the administration's policy had been established and implementing orders issued.<sup>106</sup> He later met with congressional leaders to give them briefings on developments in Korea without ever asking for authority.<sup>107</sup> Some consideration was given to presenting a joint resolution to Congress to permit lawmakers to voice their approval, but the draft resolution never left the administration.<sup>108</sup>

After Truman dispatched U.S. forces to Korea, Senator James P. Kem (R-Mo.) asked: "Does that mean that he has arrogated to himself the authority of declaring war?"<sup>109</sup> Senator Lucas responded: "I do not care to debate that question . . . I do not believe that it means war but the Senator can place his own interpretation on it."<sup>110</sup> When Kem pressed the issue, Lucas replied that "history will show that on more than 100 occasions in the life of this Republic the President as Commander in Chief has ordered the fleet or the troops to do certain things which involved the risk of war."<sup>111</sup> Of the hundred incidents referred to by Lucas, not one approached the magnitude and gravity of the Korean War.

Senator Leverett Saltonstall (R-Mass.), the minority whip, offered support for Truman's action, concluding that "it seems to me the responsibility of the President of the United States is to protect the security of the United States."<sup>112</sup> Senator Arthur Watkins (R-Utah) asked whether the President should not have notified Congress before ordering military forces to Korea. Lucas responded: "I am willing to leave what

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105. 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, at 182 (1976) [hereinafter FOREIGN RELATIONS].

106. See *id.* at 200–02.

107. See *id.* at 257.

108. *Id.* at 282, 283 & nn.1–2, 286–91.

109. 96 CONG. REC. 9228 (1950).

110. *Id.*

111. *Id.* at 9229.

112. *Id.*

has been done in the hands of the Commander in Chief."<sup>113</sup> The framers were *not* willing to leave such decisions in the hands of the President. Watkins reminded Lucas that during debate on the U.N. Charter "we were told time and time again . . . that nothing would take us into war under that pact without action by the Congress. The President could not do it."<sup>114</sup> Watkins thought that Truman should have advised Congress of developments in Korea and asked for authority "to go ahead and do whatever was necessary to protect the situation."<sup>115</sup>

Senator Hubert H. Humphrey (D-Minn.) praised Truman for exercising "the leadership and the statesmanship which the people require of the President."<sup>116</sup> What of the leadership and statesmanship required of lawmakers? Senator Estes Kefauver (D-Tenn.) advised that "this is a time to close our ranks, to forget political considerations, and to stand behind the President in the vital decision he has made."<sup>117</sup> Closing ranks is always the first step in forgetting institutional and constitutional considerations, the first step in abandoning legislative deliberation and democratic government. Senator Tom Connally (D-Tex.) urged the lawmakers "to stand behind the President . . . We cannot hesitate; we cannot divide. Any division here, by a speech or by any other expression of sentiment would be placarded all over the world as evidence that the United States is cautious or is afraid or is quaking in its boots."<sup>118</sup> In other words, any lawmaker who questioned the constitutionality of Truman's war showed weakness and even cowardice. Of such sentiments are constitutions lost.

One of the few challenges to Truman's action came from Representative Vito Marcantonio, a member of the American Labor Party from New York. He specifically objected to the reliance on the Security Council resolutions:

[w]hen we agreed to the United Nations Charter we never agreed to supplant our Constitution with the United Nations Charter. The power to declare and make war is vested in the representatives of the people, in the Congress of the United States. That power has today been usurped from us with the reading of this short statement by the President to the people of the world. We here in Congress are asked to supinely accept this usurpation of our right as representatives of the American people.<sup>119</sup>

It has been argued that Truman consulted in good faith with Congress and was told he could act without legislative authority. He reached Senator Connally by phone and asked whether he would have to ask Congress for a declaration of war if he decided to send American forces to Korea. Connally offered this advice: "If a burglar breaks into your house . . . you can shoot at him without going down to the police station and getting permission. You might run into a long debate by Congress, which would tie your hands completely. You have the right to do it as commander-in-chief and under

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113. *Id.*

114. *Id.* at 9233.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 9234.

119. *Id.* at 9268.

the U.N. Charter.”<sup>120</sup> A burglar breaking into your house? How did that analogy relate to the Korean War? Did shooting at an intruder mean also abandoning the existing legal and constitutional system? What was the problem with Congress debating the matter? The framers believed in deliberation, particularly when going to war against another country. Moreover, Truman had no constitutional right to act as he did either as commander in chief or under the U.N. Charter.

The constitutional system is not protected when a President touches base with a Senator and gets a green light, especially from someone like Connally, whose positions on the war power and presidential power were well known and whose positions on the war power during the U.N. debate had been repeatedly repudiated by the Senate and Congress.<sup>121</sup> Phone conversations are always interesting and can be of value, but they do not replace statutes, treaties, the Constitution, and the structure of government.

Similarly, it is argued that Truman acted properly because Lucas, who served on the Foreign Relations Committee and played an active role during the 1945 debates on the U.N. Charter and the U.N. Participation Act, saw no need for Congress to authorize the intervention in Korea.<sup>122</sup> When Truman asked Lucas on July 3, 1950, whether he should present to Congress a joint resolution expressing approval of his action in Korea, Lucas acquiesced to the President. He said he “frankly questioned the desirability” of asking Congress to pass a joint resolution of approval.<sup>123</sup> Things “were now going along well.”<sup>124</sup> Truman “had very properly done what he had to do without consulting Congress.”<sup>125</sup> Lucas told Truman that many members of Congress had suggested to him “that the President should keep away from Congress and avoid debate.”<sup>126</sup> Those are certainly intriguing comments by a Senate Majority Leader, but nothing Lucas could say in private or in public could alter the text and intent of the Constitution, the U.N. Charter, and the U.N. Participation Act. Truman had no authority to alter those documents and neither did Lucas.

Even if a case could be made that the emergency facing Truman in June 1950 was so fast-breaking and so perilous that it was essential for him to act first without obtaining legislative authority, nothing prevented him from returning to Congress at the earliest opportunity to ask for a supporting statute and retroactive authority, as President Lincoln had done in the Civil War.<sup>127</sup>

## 2. Clinton’s Military Initiatives

In 1991 Senate Majority Leader George Mitchell (D-Me.) vigorously challenged the claim of President George H. W. Bush that he could use military force against Iraq without first obtaining congressional authorization. Mitchell argued that the framers

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120. Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the “Imperial President” Myth*, 19 HARV. J.L. & PUB. POL’Y 533, 567 (1996) (quoting TOM CONNALLY, MY NAME IS TOM CONNALLY 346 (1954)).

121. See, e.g., 91 CONG. REC. 10,974, 11,296, 11,301, 11,303 (1945).

122. See Turner, *supra* note 120, at 574.

123. FOREIGN RELATIONS, *supra* note 105, at 287.

124. *Id.*

125. *Id.*

126. *Id.* at 290.

127. FISHER, *supra* note 25, at 48–49.

knew that "the decision to commit the Nation to war should not be left in the hands of one man . . . . [I]f [President Bush] now decides to use those forces in what would plainly be war he is legally obligated to seek the prior approval of the Congress."<sup>128</sup> Yet two years later Mitchell opposed legislative language that would have required President Clinton to obtain advance approval from Congress before sending U.S. forces to Bosnia-Herzegovina. Instead, Mitchell supported a nonbinding, sense-of-Congress resolution urging Clinton to seek congressional authorization. His proposal, he explained, "does not purport to impose prior restraints upon a President performing the duties assigned him under the Constitution."<sup>129</sup> He did not "favor prior restraints. [He] believe[d] they plainly violate the Constitution."<sup>130</sup>

On this fundamental constitutional principle, Mitchell advocated one position for Bush and the opposite for Clinton. Mitchell did not mind prior restraints when applied to Bush. The requirement for prior approval, suitable for Bush, would be replaced by a prohibition on prior approval. Under the second theory, the decision to commit the country to war could be "left in the hands of one man." If Mitchell really believed that prior restraint by Congress interfered with a President's supposed constitutional power, why urge Clinton to seek authority from Congress when it was not necessary? What happened to the first theory? If a constitutional principle is worth fighting for under one President, it is worth fighting for under the next. Otherwise, it is idle to talk about constitutional principles. Matters of war are left to short-term partisan calculations.

More disturbing, in terms of congressional interest in protecting its institutional interests, are statements by Republican leaders in both the Senate and the House who spoke openly in favor of Clinton's broad and unreviewable powers as commander in chief. In objecting to any legislative constraints on Clinton's decision to use military force in Bosnia in 1995, Senate Majority Leader Bob Dole said that Clinton had the constitutional authority "to do what he feels should be done regardless of what Congress does."<sup>131</sup> In an interview with CBS News, Dole remarked: "No doubt about it, whether Congress agrees or not, troops will go to Bosnia."<sup>132</sup>

That is an extraordinary statement for a legislative leader, or even for a lawmaker. No matter "what Congress does," even in passing language that denies funds for a military commitment without express congressional approval, Clinton could do whatever "he feels." The Constitution does not control. The rule of law is replaced by the rule of a single person. Under Dole's theory of government, checks and balances essential to constitutional government do not operate and Congress is not remotely a coequal branch. If the President decided on a course of action in ordering U.S. troops abroad, Congress was powerless to control him. Its only duty would be to appropriate funds needed for the military commitment and perhaps later decide whether to terminate funding for an operation that had gone sour.

Dole spoke as the Republican front-runner for President in 1996. Instead of protecting the institutional interests of the Senate or constitutional values, he looked to presidential leadership and public opinion polls. He said: "We need to find some way

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128. 137 CONG. REC. 408 (1991).

129. 139 CONG. REC. 25,483 (1993).

130. *Id.*

131. 141 CONG. REC. 34,504 (1995).

132. Ann Devroy & Helen Dewar, *U.S. Troops Vital to Bosnia Peace, Clinton Says*, WASH. POST, Nov. 28, 1995, at A1.

to be able to support the president and I think we need to wait and see what the American reaction is.”<sup>133</sup> Whatever direction the country decided to take would not come from Dole. He was not a leader of his institution or of policy. Why was there the overriding need to support the President? The Senate eventually passed, sixty-nine to thirty, a multi-part bill that provided support for American troops in Bosnia but expressed “reservations” about sending them there.<sup>134</sup> If the Senate had reservations and wanted to protect U.S. troops, the logical policy would have been to prohibit deployment.

Senator Dole explained some of the purposes of the bill that passed. One was to shift responsibility from Congress to the President. He said that Clinton “made this decision and he takes responsibility. It was his decision to send troops and his decision alone.”<sup>135</sup> The last three words are in direct contradiction to the Framers’ purpose of placing the war power in Congress. Dole further stated: “This resolution does not endorse the President’s decision. It does not endorse the agreement reached in Dayton.”<sup>136</sup> Dole continued to elaborate: “We can posture and complain about the President’s decision. I do not like it. He knows I do not like it. I told him I do not like it.”<sup>137</sup> Then why not draft legislation to tell the President not to do what he wanted to do? In the end, Clinton was able to deploy 20,000 American troops to Bosnia without first seeking and obtaining authority from Congress.

### *C. Federal Judges*

From the Vietnam War to the present, there has been a growing consensus that federal courts lack both the jurisdiction and the competence to decide war power disputes. I have heard this sentiment directly from political science professors, law professors, and federal judges. Such a cramped view finds no support in the first 150 years of U.S. history, when courts regularly accepted and decided such cases, sometimes for the President, sometimes against. It was only with Vietnam that courts began to avoid the merits of war power cases by invoking a variety of threshold tests, including standing, mootness, ripeness, the political question doctrine, and prudential considerations.<sup>138</sup>

I am familiar with only one war power (actually commander in chief) case that the Supreme Court deliberately ducked over this period of 150 years.<sup>139</sup> The State of Mississippi sought to enjoin President Andrew Johnson from using the military to implement two Reconstruction Acts. The Court worried what would happen if Johnson refused to comply with its order. Did the Court have the power (legal or political) to enforce its process? Federal courts had faced that prospect before without flinching. The Johnson case was doubly difficult because if Johnson complied with the Court order and became subject to impeachment by acting in contempt of congressional

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133. Dan Balz, *As Dole Equivocates on Troop Deployment, Most GOP Rivals Oppose Plan*, WASH. POST, Nov. 28, 1995, at A9.

134. 141 CONG. REC. 36,908 (1995).

135. *Id.* at 36,905.

136. *Id.*

137. *Id.* at 36,906.

138. Louis Fisher, *Judicial Review of the War Power*, 35 PRES. STUD. Q. 466 (2005).

139. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866).



statutes, would the Court then step in to support Johnson in opposition to the House? Of course if the House impeached Johnson and the matter moved to a Senate trial, the Chief Justice would preside. All in all, the dispute was one to avoid.

But other than the Johnson case, federal courts regularly received war power disputes and disposed of them on the merits. There was nothing about war power cases that disqualified the judiciary. They presented statutory and constitutional questions as did other cases. The notion that courts are poorly suited to decide war power and foreign affairs issues does not emerge until after World War I. The legal literature began to treat matters of foreign policy, war, and peace as beyond the scope of judicial cognizance. That position appeared in a series of law review articles in the 1920s.<sup>140</sup> Still, federal courts continued to take war power cases and decide them, as in the *Steel Seizure* case of 1952.<sup>141</sup>

The war in Vietnam and Southeast Asia sparked dozens of lawsuits challenging the President's authority to wage war without a formal declaration or explicit authorization from Congress. Initially, federal courts dismissed these cases on the grounds that they posed a political question, they represented an unconsented suit against the United States, or the plaintiffs lacked standing. The Supreme Court regularly denied petitions seeking its review of the questions involved. For the first time in its history, federal courts were using the political question doctrine on a regular basis to avoid fundamental constitutional questions about the war power. By the early 1970s, however, federal courts seemed ready to reach the merits of the constitutionality of America's involvement in Indochina and to assert the judiciary's competence to decide such questions.<sup>142</sup>

Following the end of the Vietnam War, lawsuits continued to challenge presidential authority to conduct military operations without authorization from Congress. Federal judges fell back on various threshold tests to avoid deciding the dispute: ripeness, mootness, political questions, equitable discretion, and standing. Many of the cases failed in court because they were brought by members of Congress. Federal judges regularly informed the lawmakers that if they wanted to resort to litigation they had to first exhaust the institutional remedies available to them, including voting to deny authorization or funding.<sup>143</sup>

The doctrinal incoherence among federal judges on war power issues is illustrated by a lawsuit challenging the constitutionality of President Clinton's decision in 1999 to order the bombing of Yugoslavia without congressional authorization. A district court held that lawmakers lacked standing because their complaint—the alleged “nullification” of congressional votes—was not sufficiently concrete. To gain standing, legislative plaintiffs had to allege that their votes had been “completely nullified” or “virtually held for naught.”<sup>144</sup> The case would have been ripe for judicial determination if Congress had directed Clinton to remove U.S. forces and he had refused, or if

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140. Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); A. E. Gold, Comment, *Jurisdiction of the Supreme Court over Political Questions: What Is a Political Question?*, 9 CORNELL L.Q. 50 (1923); Melville Fuller Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925).

141. *Youngstown Steel & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

142. Fisher, *supra* note 138, at 484–88.

143. *Id.* at 489–91.

144. *Campbell v. Clinton*, 52 F. Supp. 2d 34, 43 (D.D.C. 1999).

Congress had withheld funds for the air strikes in Yugoslavia and he had decided "to spend that money (or money earmarked for other purposes) anyway."<sup>145</sup>

The D.C. Circuit affirmed on the same ground of lack of standing. It concluded that the lawmakers lacked standing because they possessed legislative power to force the President to withdraw U.S. troops, to cut off funds, or to impeach the President if he disregarded congressional authority.<sup>146</sup> The appellate decision is interesting because the three judges wrote separate opinions based on very different legal doctrines. To Judge Silberman, no one had a legal right to challenge the President's use of military force. Such claims were nonjusticiable because courts lacked discoverable and manageable standards to decide questions related to the War Powers Clause.<sup>147</sup> Judge Tatel rejected the view that the case posed a nonjusticiable political question or that there was a lack of manageable standards. He believed that the case presented purely legal issues, calling on the courts to determine the proper constitutional allocation of power between Congress and the President.<sup>148</sup>

The sweeping assertions of presidential power after 9/11 led to challenges in federal courts and eventually prompted the Supreme Court's decisions on June 28, 2004. Writing for the plurality in *Hamdi v. Rumsfeld*, Justice O'Connor rejected the government's position that separation of powers principles "mandate a heavily circumscribed role for the courts."<sup>149</sup> A state of war, she said, "is not a blank check for the President when it comes to the rights of the Nation's citizens."<sup>150</sup> This decision, with Justices scattering in different directions, provided few clear standards for the lower courts, but at least eight members of the Court rejected the notion that the judiciary lacks institutional competence to participate in constitutional questions of war.<sup>151</sup>

#### D. The Academic Community

Prominent academics offered strong public support for Truman's intervention in Korea. In an article for the *New York Times* on January 14, 1951, the historian Henry Steele Commager insisted that Truman's critics could find "no support in law or in history."<sup>152</sup> Commager argued that when Congress passed the U.N. Participation Act "it made the obligations of the Charter of the United Nations law, binding on the President."<sup>153</sup> Commager failed to analyze the statutory text and the legislative history of the U.N. Participation Act (requiring prior approval by Congress) and ignored the

145. *Id.*

146. *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000).

147. *Id.* at 24–25 (Silberman, J., concurring).

148. *Id.* at 37–39 (Tatel, J., concurring); see also Louis Fisher, *The Law: Litigating the War Power with Campbell v. Clinton*, 30 PRES. STUD. Q. 564 (2000).

149. 542 U.S. 507, 535 (2004).

150. *Id.* at 536.

151. Justice Thomas was the only member of the Court to argue that the judiciary lacked institutional competence to rule on war power questions. *Id.* at 579, 583, 585–86, 589–92 (Thomas, J., dissenting).

152. Henry Steele Commager, *Presidential Power: The Issue Analyzed*, N.Y. TIMES, Jan. 14, 1951, § 6 (Magazine), at 11.

153. *Id.*

fundamental constitutional violation that would occur if the President and the Senate, through the treaty process, stripped the House of Representatives of its prerogatives over war.

In the 1960s, with the nation mired in a bitter war in Vietnam, Commager apologized for his unreserved endorsement of presidential war power. He told the Senate Foreign Relations Committee in 1967 that there should be a reconsideration of executive-legislative relations in the conduct of foreign relations.<sup>154</sup> Returning to the committee in 1971, he testified that "it is very dangerous to allow the President to, in effect, commit us to a war from which we cannot withdraw, because the warmaking power is lodged and was intended to be lodged in the Congress."<sup>155</sup> How could a leading historian of constitutional law miss that elementary point in 1950?

Arthur M. Schlesinger, Jr. also threw his weight behind the Korean War. In a letter to the *New York Times* on January 9, 1951, he attacked Senator Robert Taft (R-Ohio) for saying that Truman "had no authority whatever to commit American troops to Korea without consulting Congress and without Congressional approval."<sup>156</sup> He also rejected Taft's position that Truman, by sending troops to Korea, "simply usurped authority, in violation of the laws and the Constitution."<sup>157</sup> Schlesinger sharply dismissed Taft's statements as "demonstrably irresponsible" and claimed that American Presidents had "repeatedly committed American armed forces abroad without prior Congressional consultation or approval."<sup>158</sup>

Demonstrably irresponsible statements had been made, but they were by Schlesinger, not Taft. As valid precedent for Truman's actions in the Korean War, Schlesinger pointed to Jefferson's use of ships to repel the Barbary pirates. In fact, Jefferson took limited defensive actions in the Mediterranean and came to Congress to seek authority for anything that went "beyond the line of defense."<sup>159</sup> And Congress enacted ten statutes to authorize military action by Presidents Jefferson and Madison in the Barbary wars.<sup>160</sup> There is no connection between the actions of Jefferson and Truman. Truman seized the full warmaking authority—defensive and offensive—and never came to Congress for authority. Jefferson respected congressional prerogatives and constitutional limits. Truman did neither. None of the examples cited by Schlesinger were of a magnitude to justify or legalize what Truman did in Korea.<sup>161</sup>

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154. *Changing American Attitudes Towards Foreign Policy: Hearings Before the S. Comm. on Foreign Relations*, 90th Cong. 21 (1967) (statement of Henry Steele Commager, Professor of History, Amherst College).

155. *War Powers Legislation Policy: Hearings Before the S. Comm. on Foreign Relations*, 92d Cong. 62 (1971) (statement of Henry Steele Commager, Professor of History, Amherst College).

156. Arthur Schlesinger, Jr., Letter to the Editor, *Presidential Powers: Taft Statement on Troops Opposed, Actions of Past Presidents Cited*, N.Y. TIMES, Jan. 9, 1951, at 28.

157. *Id.*

158. *Id.*

159. 1 Richardson, *supra* note 49, at 315.

160. FISHER, *supra* note 25, at 35–36.

161. See Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21 (1995).

At the height of the Vietnam War, Schlesinger expressed regret for calling Taft's statement "demonstrably irresponsible."<sup>162</sup> He explained that he had responded with "a flourish of historical documentation and, alas, hyperbole."<sup>163</sup> The problem went far beyond flourishes and hyperbole. What Taft said was true. What Schlesinger said was not. As a professional historian, he should have known better. The explanation for Schlesinger's performance is that during the Korean War he decided to abandon his academic role, requiring independence and integrity, and pursue a partisan agenda. In 1973, Schlesinger described the domestic and international pressures that helped concentrate the war power in the President: "It must be said that historians and political scientists, this writer among them, contributed to the presidential mystique."<sup>164</sup> The issue was not something vague like mystique. It was the pattern of Presidents violating constitutional and statutory limits with the encouragement and support of academics.

Edward S. Corwin took Commager and Schlesinger to task by labeling them the "high-flying prerogative men."<sup>165</sup> However, Corwin himself had been careless in his earlier publications in the way he described the scope of presidential war power. Writing in 1949, he said that the original grant of authority to the President to "repel sudden attacks" had developed into an "undefined power—almost unchallenged from the first and occasionally sanctified judicially—to employ without congressional authorization the armed forces in the protection of American rights and interests abroad whenever necessary."<sup>166</sup> Those earlier life-and-property actions were minuscule in comparison with the Korean War. Nor can one find in the judicial record any decision that could come close to justifying Truman's war. Corwin recognized, in his 1949 article, find that the U.N. Participation Act was based on the theory that American participation in U.N. military actions "is a matter for Congressional collaboration."<sup>167</sup>

A major figure in presidential studies was Richard Neustadt. His *Presidential Power* dominated the field and taught students and professors how Presidents gain and exercise political power. His book is often remembered for the theme that presidential power "is the power to persuade."<sup>168</sup> Also well known is his observation that the Constitutional Convention did not create a government of separated powers: "Rather, it created a government of separated institutions *sharing* powers."<sup>169</sup> Those passages suggest mutual accommodation, shared power, and a system of checks and balances.

Later in the book, however, Neustadt clearly advised Presidents to take power, not give it. Power was something to be acquired and concentrated in the presidency. The power was for personal—not constitutional—use. Presidents had every right to seek power for their own use and enjoyment. Neustadt covered much of Truman's initiative in the Korean War, including his decision to fire General Douglas MacArthur and the Supreme Court's decision to strike down Truman's seizure of steel mills to prosecute

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162. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 139 (1973).

163. *Id.*

164. *Id.* at ix.

165. Edward S. Corwin, *The President's Power*, *NEW REPUBLIC*, Jan. 29, 1951, at 15.

166. Edward S. Corwin, *Who Has the Power to Make War?*, *N.Y. TIMES*, July 31, 1949, § 6 (Magazine), at 14.

167. *Id.*

168. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 32 (1960).

169. *Id.* at 33 (emphasis in original).

the war. Yet whether Truman had constitutional or legal authority to go to war did not interest Neustadt at all, nor did he examine Truman's inflated definitions of executive emergency power that the judiciary and the country found so offensive.<sup>170</sup> Certainly Truman never used the power of "persuasion" to convince Congress and the public to support the war. In launching military force there was no talk of "shared power."

Instead, Neustadt gave Presidents every incentive to push power to the maximum, regardless of ostensible constitutional and statutory limits. It was Truman's job "to make decisions and to take initiatives."<sup>171</sup> Among Truman's private values, "decisiveness was high upon his list." His image of the President was as "man-in-charge."<sup>172</sup> Operating under this theory, Truman had no obligation to persuade others or enter into a give-and-take. The overriding value was making a decision and taking the initiative. Action by itself was a virtue. Identifying constitutional or legal authority was not. Neustadt's book is written for "a man who seeks to maximize his power."<sup>173</sup> It would fit the needs of an American President, Winston Churchill, Adolf Hitler, Benito Mussolini, or Joseph Stalin. Success is measured by action, vigor, decisiveness, initiative, energy, and personal power. Entirely absent are constitutional checks and sources of authority.<sup>174</sup>

### *E. The Media*

Newspaper reporters, television correspondents, and other media outlets have contributed to the belief that Presidents may initiate wars. Newspaper and television accounts focus on battles, victories, and setbacks. Almost no consideration is given to the President's source of authority and how the expansion of executive power threatens representative government, civil liberties, and the constitutional system of checks and balances. There are important exceptions to this record, including the incisive articles and books by Seymour Hersh.<sup>175</sup>

The media furthers the agenda of the executive branch by taking administration statements at face value and distributing them without independent analysis to the public. During the Reagan years, the State Department released a report called "Communist Interference in El Salvador."<sup>176</sup> Nineteen documents (in Spanish) were attached, but most reporters chose to rely on an eight-page summary that the department conveniently provided. The result was a "fantastic public relations coup for the State Department as reporters in effect reduced themselves to human transmission

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170. Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMM. 63, 67-71 (2000) (describing the negative reaction of the public, media, and judiciary to Truman's definitions of emergency executive power).

171. NEUSTADT, *supra* note 168, at 175.

172. *Id.*

173. *Id.* at 181.

174. For further details on academic contributions to a strong presidency, particularly in time of war, see Louis Fisher, *Scholarly Support for Presidential Wars*, 35 PRES. STUD. Q. 590 (2005).

175. See, e.g., SEYMOUR HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004).

176. MARK HERTSGAARD, ON BENDED KNEE: THE PRESS AND THE REAGAN PRESIDENCY 110 (1988).

belts, disseminating propaganda that would later be revealed to be false.”<sup>177</sup> It is hard to imagine a reporter behaving in the same compliant and gullible manner by printing summaries prepared by congressional committees or a lawmaker’s personal office.

In several articles in 1995, Katharine Q. Seelye of the *New York Times* stated that President Clinton did not need congressional approval in order to send troops into the Balkans.<sup>178</sup> I wrote this to her:

Instead of saying, flatly, that Clinton doesn’t need the support of Congress, I wish you would say that according to him, and according to some people like [Senator Bob] Dole, he doesn’t need it. There are a number of people, including myself, who believe that he cannot act constitutionally unless he has not only the support but the authority of Congress. The legal and constitutional picture is more complex than you paint it.<sup>179</sup>

My letter seemed to hit home. Five days later Seelye wrote in a newspaper column: “The President says he does not need Congressional authorization for the mission.”<sup>180</sup> However, the *New York Times* had already served to “educate” other periodicals. One newspaper, *The Hill*, initially wrote: “Clinton says he’d welcome congressional support, but doesn’t think he needs it. . . . But the Constitution is clear. Only Congress has the ability to declare war.”<sup>181</sup> A month later this newspaper reversed course, now stating: “Although President Clinton has the constitutional authority to send U.S. troops to lead a NATO peacekeeping force, and could do so even if Congress votes otherwise, he could be taking an enormous political risk . . . .”<sup>182</sup>

I called the editor and asked why the newspaper had changed its legal position and on what basis did it promote this independent constitutional power for the President. The answer: his staff accepted the President’s unilateral power because of what the *New York Times* had said! Without any basis other than careless wording in a leading newspaper—wording that would later be corrected—*The Hill* wrote an editorial that helped misinform a large audience of lawmakers and congressional staff. Similarly, an editorial by the *Washington Post* blithely remarked: “It is true that President Clinton is

177. *Id.*

178. E.g., Katharine Q. Seelye, *Congress and the White House Barter over Support for U.S. Mission*, N.Y. TIMES, Dec. 5, 1995, at A7 (“President Clinton does not need the support of Congress for the mission.”); Katharine Q. Seelye, *G.O.P. Opposition Forces Dole to Delay Vote on Bosnia*, N.Y. TIMES, Dec. 6, 1995, at A14 (“President Clinton does not need a resolution from Congress to deploy the troops.”); Katharine Q. Seelye, *Legislators Get Plea by Clinton on Bosnia Force*, N.Y. TIMES, Nov. 29, 1995, at A1 (stating that President Clinton “does not need the approval of Congress to send troops to the Balkans”).

179. Letter from Louis Fisher, Senior Specialist in Separation of Powers, Congressional Research Service, The Library of Congress, to Katharine Q. Seelye, Reporter, The N.Y. Times (Dec. 7, 1995) (on file with author).

180. Katharine Q. Seelye, *Clinton Gives Republicans Pledge on Arming Bosnians*, N.Y. TIMES, Dec. 13, 1995, at A16. The following day she wrote that “President Clinton maintained he did not need the authorization of Congress” to send troops into Bosnia. Katharine Q. Seelye, *Anguished, Senators Vote to Support Bosnia Mission; Clinton off to Paris Signing*, N.Y. TIMES, Dec. 14, 1995, at A1.

181. *Bosnia and Congress*, THE HILL, Oct. 25, 1995, at 32.

182. *Say ‘no’ to the Dayton Deal*, THE HILL, Nov. 29, 1995, at 24.

asking Congress to approve a Bosnia deployment that he has the formal power to order without asking.”<sup>183</sup>

Reporters praised the position of Senate Majority Leader Dole for supporting Clinton’s decision to send troops to Bosnia. Even though Dole thought the deployment was a mistake, he backed Clinton: “We have one president at a time. . . . He is the commander in chief. He’s made this decision. I don’t agree with it. I think it’s a mistake. We had a better option, many better options . . . .”<sup>184</sup> According to a reporter for the *Washington Post*, Dole’s “old values” emerged on Bosnia. His position gave the world “a glimpse of what many colleagues regard as the essential Dole: the wounded, decorated World War II veteran who never forgot how to salute his commander in chief.”<sup>185</sup> The analogy here could not be more misplaced. It was Dole’s obligation, as an enlisted man, to salute the President in World War II. It was not his obligation as Senate Majority Leader to salute the President. As a member of Congress, Dole took an oath to support the Constitution, not the President.

Newspapers did a fairly good job of scrutinizing the claims of the Bush administration in 2002 that Saddam Hussein possessed weapons of mass destruction. The press repeatedly and closely analyzed the assertions that Iraq was using aluminum tubes to make nuclear weapons, had developed unmanned aerial vehicles to carry chemical or biological agents, and was trying to purchase uranium ore from a country in Africa. Detailed newspaper stories regularly punctured supposed ties between Iraq and al Qaeda. The press found executive statements about weapons of mass destruction to be either baseless or strained.<sup>186</sup>

A year after President George W. Bush went to war against Iraq, and after inspections throughout the country had failed to uncover any weapons of mass destruction, several newspapers and magazines began to issue apologies for the unsatisfactory manner in which they had discharged their First Amendment duties. On May 26, 2004, the *New York Times* prepared a statement that took pride in much of its coverage, but noted a number of instances in which its reporting “was not as rigorous as it should have been.”<sup>187</sup> The *Times* found special fault with its dependence on information “from a circle of Iraqi informants, defectors and exiles bent on ‘regime change.’”<sup>188</sup> Subsequent reports found much of the information from the exiles to be unreliable and false. Then came this intriguing passage: “Complicating matters for journalists, the accounts of these exiles were often eagerly confirmed by United States officials convinced of the need to intervene in Iraq. Administration officials now

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183. Editorial, *Bosnia Opportunity*, WASH. POST, Nov. 29, 1995, at A24.

184. Helen Dewar & Michael Dobbs, *Dole Supports U.S. Troop Plan for Bosnia Peace*, WASH. POST, Dec. 1, 1995, at A1 (internal quotations omitted).

185. Helen Dewar, *Dole’s ‘Old Values’ Emerge on Bosnia*, WASH. POST, Dec. 2, 1995, at A1.

186. See Louis Fisher, *Justifying War Against Iraq*, in *RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS* 289 (James A. Thurber, ed., 3d ed. 2005); Fisher, *supra* note 95; James P. Pfiffner, *Did President Bush Mislead the Country in His Arguments for War with Iraq?*, 34 PRES. STUD. Q. 25 (2004).

187. Editorial, *The Times and Iraq*, N.Y. TIMES, May 26, 2004, at A10.

188. *Id.*

acknowledge that they sometimes fell for misinformation from these exile sources. So did many news organizations—in particular, this one.”<sup>189</sup>

This explanation falls flat. It is a mea culpa without the mea. There was no “complication” for journalists. The first mistake was the media’s reliance on exiles who had a political agenda (to get rid of Saddam Hussein) and who had been out of the country so long that their information was dated or erroneous. The press should have been on guard and skeptical about their claims. The fact that executive officials “eagerly confirmed” the accounts of exiles hardly justified publication. The executive officials had the same political agenda: to oust Saddam Hussein by charging that he possessed WMDs. It should have been one red flag followed by another. The *Times* offered another explanation:

Editors at several levels who should have been challenging reporters and pressing for more skepticism were perhaps too intent on rushing scoops into the paper. Accounts of Iraqi defectors were not always weighed against their strong desire to have Saddam Hussein ousted. Articles based on dire claims about Iraq tended to get prominent display, while follow-up articles that called the original ones into question were sometime buried. In some cases, there was no follow-up at all.<sup>190</sup>

This explanation, however, is unconvincing. No doubt there is a desire to rush scoops into the paper. But why wouldn’t a scoop undermining the case for the WMDs be just as newsworthy as a scoop by an Iraqi exile claiming the existence of WMDs? Why did articles based on dire claims about WMDs get more prominent display? Why were articles challenging that assessment sometimes buried or never pursued? Why did there seem to be bias in favor of military operations?

On June 28, 2004, the *New Republic* offered its regrets for supporting the war in Iraq and accepting the administration’s claims that Saddam Hussein was hiding WMDs.<sup>191</sup> By early 2003, before the United States began military operations, the magazine said “it was becoming clear that at least two pieces of evidence the administration cited as proof of Saddam Hussein’s nuclear program—his supposed purchase of uranium from Niger and his acquisition of aluminum tubes for a supposed nuclear centrifuge—were highly dubious. . . . In retrospect, we should have paid more attention to these warning signs.”<sup>192</sup> Given the uncertainty of the evidence, why did the magazine lean toward war?

Additional soul-searching came from the *Washington Post*. The executive editor and other top editors said that the newspaper had made a mistake before the war began by not giving front-page prominence to articles that cast doubt on the administration’s argument about WMDs in Iraq. Candor is commendable, but why the pronounced bias? Why promote one side and give less attention to the other? Articles that questioned the administration’s rationale did not appear on the front page, but further back—say, page eighteen or twenty-four—in the paper. In contrast, from August 2002 to the start of military operations on March 19, 2003, the *Post* ran more than 140 front-page stories

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189. *Id.*

190. *Id.*

191. *Were We Wrong?*, NEW REPUBLIC, June 28, 2004, at 8; see also Howard Kurtz, *New Republic Editors ‘Regret’ Their Support of Iraq War*, WASH. POST, June 19, 2004, at C1.

192. *Were We Wrong?*, *supra* note 191, at 8.



that highlighted administration rhetoric that justified war. Here are some of the sensational headlines: "Cheney Says Iraqi Strike Is Justified"; "War Cabinet Argues for Iraq Attack"; "Bush Tells United Nations It Must Stand Up to Hussein or U.S. Will"; "Bush Cites Urgent Iraqi Threat"; "Bush Tells Troops: Prepare for War."<sup>193</sup> Why this drumbeat for war from a supposedly independent press? Why did those stories, which could have been written by the White House, displace stories that questioned and analyzed the administration's facts and statements?<sup>194</sup>

#### V. THE NEOCONS AND THE FEDERALIST SOCIETY

As a driving force behind the second Iraq War, one has to understand the contributions of the neoconservatives ("the neocons") and the Federalist Society. The push for an aggressive foreign policy came from the neocons, while key members of the Federalist Society helped crystallize the legal and constitutional doctrines that justified placing offensive war powers in the presidency, subject to few checks from Congress or the judiciary. These political and legal formulations led to the release of false information to justify military action, the torture memos drafted by the Justice Department, and "extraordinary rendition" as practiced by the CIA.

##### A. Strauss and the Neocons

Neoconservatives had taken a hard military line against Communism and continued to press that agenda after the collapse of the Soviet Union. Neocons, strategically located in the White House and executive departments, began drafting ambitious plans for military action against Iraq and converting its government to a liberal democracy. This community of academic activists owes a special debt to the political philosopher Leo Strauss.

Leo Strauss left Germany in 1932 to conduct research in France and England. He moved to the United States in 1938 and taught for several decades at the New School for Social Research and the University of Chicago. Strauss concentrated on political philosophy, not foreign policy or national security, and yet his writings reveal a passionate stand against totalitarianism, opposition to relativism, and critiques of value-free scholarship.<sup>195</sup> He faulted liberalism for producing relativism, an erosion of religious faith, and nihilism, and he associated liberal democracy with the weak and ineffective Weimar Republic that fell to Nazism.<sup>196</sup> Strauss opposed much of

193. Mike Allen, *Bush Tells Troops: Prepare for War*, WASH. POST, Jan. 4, 2003, at A1; Mike Allen, *War Cabinet Argues for Iraq Attack*, WASH. POST, Sept. 9, 2002, at A1; Karen DeYoung, *Bush Cites Urgent Iraqi Threat*, WASH. POST, Oct. 8, 2002, at A1; Karen DeYoung, *Bush Tells United Nations It Must Stand Up to Hussein or U.S. Will*, WASH. POST, Sept. 13, 2002, at A1; Dana Milbank, *Cheney Says Iraqi Strike Is Justified*, WASH. POST, Aug. 27, 2002, at A1.

194. See Howard Kurtz, *The Post on WMDs: An Inside Story*, WASH. POST, Aug. 12, 2004, at A1; *Washington Post Rethinks Its Coverage of War Debate*, N.Y. TIMES, Aug. 13, 2004, at A14.

195. See Leo Strauss, *An Epilogue*, in *ESSAYS ON THE SCIENTIFIC STUDY OF POLITICS* 307 (Herbert J. Storing ed., 1962).

196. SHADIA B. DRURY, *LEO STRAUSS AND THE AMERICAN RIGHT* 2-17 (1997).

modernism and sought guidance from earlier times. In similar fashion, Moslem fundamentalists resist the influence of the West and look to more traditional values. Generalizations about Straussians are hazardous. They split into different camps and frequently war with one another.<sup>197</sup> Prominent neocons in the defense establishment include such names as Paul Wolfowitz, Douglas Feith, Abram Shulsky, I. Lewis (Scooter) Libby, William Kristol, Carnes Lord, Gary Schmitt, Richard Perle, Elliott Abrams, John Bolton, and Zalmay Khalilzad.<sup>198</sup>

Straussians and neocons object to modernism's "turning away from the traditional understanding of truth as an independently existing, accessible and knowable quality."<sup>199</sup> From this vantage point they stake out a strong moral position on good and evil, whether evil takes the form of a political philosopher, Communism, or Saddam Hussein. Strauss, for example, called Machiavelli the "teacher of evil."<sup>200</sup> Strauss's writing style has been described as combative, rancorous, truculent, belligerent, and aggressive.<sup>201</sup> His critiques of those he disagreed with were "sharp, cutting, and often rebuking."<sup>202</sup> In their ideological battles with domestic and international adversaries, neocons "have not infrequently viewed their enemies as embodiments of evil who must be destroyed, rather than as opponents to be debated or persuaded."<sup>203</sup> In these public debates, neocons "seemed less interested in promoting dialogue with opponents than with demolishing them."<sup>204</sup>

The word "evil" is not used casually. It evokes strong emotions in Straussians and neocons. It was not happenstance that President Ronald Reagan called the Soviet Union "the evil empire," and it was a short step from there to President George W. Bush referring to Iraq, Iran, and North Korea as the "axis of evil." Allan Bloom, a Straussian and author of the best-selling *The Closing of the American Mind* (1987), inveighed against moral relativism and the consequent loss of the search for truth. Students, he mourned, had "no idea of evil."<sup>205</sup> Consistent with this theme is a recent book by David Frum and Richard Perle: *An End to Evil: How to Win the War on Terror*.<sup>206</sup>

197. *Id.* For a collection of essays by Straussians, see LEO STRAUSS, THE STRAUSSIANS, AND THE AMERICAN REGIME (Kenneth L. Deutsch & John A. Murley eds., 1999).

198. JAMES MANN, *RISE OF THE VULCANS: THE HISTORY OF BUSH'S WAR CABINET* 22–29 (2004); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA 200–07* (2004); ANNE NORTON, LEO STRAUSS AND THE POLITICS OF AMERICAN EMPIRE 6–18 (2004); Elizabeth Drew, *The Neocons in Power*, N.Y. REV. OF BOOKS, June 12, 2003, at 20–22.

199. Bernard Susser, *Leo Strauss: The Ancient as Modern*, 36 POL. STUD. 497, 499 (1988).

200. LEO STRAUSS, *THOUGHTS ON MACHIAVELLI* 9 (1958). Elsewhere in this book he calls Machiavelli "an evil man," "immoral and irreligious," "diabolical," and "a devil." *Id.* at 9, 12–13.

201. Susser, *supra* note 199, at 498, 512, 514.

202. Hwa Yol Jung, *Leo Strauss's Conception of Political Philosophy: A Critique*, 29 REV. POL. 492, 492 (1967).

203. JOHN ERMAN, *THE RISE OF NEOCONSERVATISM: INTELLECTUALS AND FOREIGN AFFAIRS 1945–1994*, at 190 (1995).

204. GARY DORRIEN, *THE NEOCONSERVATIVE MIND: POLITICS, CULTURE, AND THE WAR OF IDEOLOGY*, at ix (1993).

205. ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 67 (1987).

206. DAVID FROM & RICHARD NORMAN PERLE, *AN END TO EVIL: HOW TO WIN THE WAR ON*

Neocons are comforted by the thought that evil is on one side and they are on the other. Fighting evil, as they see it, justifies whatever steps are needed to advance "the truth." If facts must be withheld or twisted to promote war and achieve a noble cause, justification comes easy. In her writings, Sissela Bok explained that individuals who are convinced they know the truth have no difficulty in telling lies: "They may perpetuate so-called pious frauds to convert the unbelieving or strengthen the conviction of the faithful. They see nothing wrong in telling untruths for what they regard as a much 'higher' truth."<sup>207</sup> Of course this frame of mind, resolute spirit, crusading militarism, and moral certitude are held with equal intensity by neocons and Islamic fundamentalists. Both sides see themselves as fighting evil.<sup>208</sup>

Strauss had a pattern of fabricating monsters and bugbears. He claimed that Nietzsche "preached the sacred right of 'merciless extinction' of large masses of men . . ."<sup>209</sup> Strauss provided no evidence or citation to support that attack, and scholars of Nietzsche find nothing in his writings to justify Strauss's intemperate and irresponsible broadside.<sup>210</sup> The neocons who shaped the military operations against Iraq did not dedicate their professional careers to political philosophy, as Strauss did. What they inherited from him—and applied to Iraq—was a similar manner of argument: dividing the world between good and evil; a penchant for identifying enemies, real or imagined; a certitude and dogmatic spirit that accompanies the belief that one is in the right and knows the truth; a writing style honed to attack and to demonize, with or without supporting evidence; a determination to confront and root out regimes designated as evil; and a consequent willingness to employ military force, deception, and manipulation to advance a predetermined political cause. Those Straussian values supplied important energy, focus, and discipline to remove Saddam Hussein from power.

In the 1980s, neocons were successful in having President Ronald Reagan promote Wilsonian principles as part of an effort to spread democracy around the globe. The strategy of neocons at that time depended on political pressure and financial assistance, not military force.<sup>211</sup> Joshua Muravchik's book, *Exporting Democracy*, is written within a framework of democratic realism, which includes a willingness to advance U.S. interests by war. However, the techniques he urged were ideological, not military: overseas radio broadcasting, rhetorical encouragement, emergency relief, economic credits, debt relief, investment, internships in the West, student exchanges, and placement of U.S. experts abroad to counsel on fledgling civil and governmental bodies and businesses.<sup>212</sup>

Institutionally, neocons line up behind a powerful presidency. They view any attack on the President as damaging "the main institutional capability the United States possesses for conducting an overt fight against the spread of Communist power in the

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TERROR (2003).

207. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 7 (1978).

208. See TARIQ ALI, BUSH IN BABYLON: THE RECOLONISATION OF IRAQ (2003); TARIQ ALI, THE CLASH OF FUNDAMENTALISMS: CRUSADES, JIHADS AND MODERNITY (2003).

209. LEO STRAUSS, WHAT IS POLITICAL PHILOSOPHY? 54–55 (Univ. of Chicago Press 1988) (1959).

210. LAURENCE LAMPERT, LEO STRAUSS AND NIETZSCHE 8 (1996).

211. ERMAN, *supra* note 203, at 161–63.

212. JOSHUA MURAVCHIK, EXPORTING DEMOCRACY: FULFILLING AMERICA'S DESTINY (1992 ed.).

world.”<sup>213</sup> Although neocons frequently praise Ronald Reagan as a strong leader, they criticized his failure in office to protect the institutional powers of the presidency, leaving the office “weaker than he found it.”<sup>214</sup> Charles Krauthammer’s method of constitutional analysis is straightforward. The touchstone is not the text of the Constitution, the framers’ intent, or the principles of republican government. Rather, look to see what is needed for imperial government and work backward to find that the necessary actor is an imperial President: “politically, imperial responsibility demands imperial government, which naturally encourages an imperial presidency, the executive being (in principle) a more coherent and decisive instrument than its legislative rival.”<sup>215</sup> Of course the Framers knew all about executives and monarchs claiming to be more “coherent” and “decisive” and rejected that model as posing too great a risk to democratic government.

### B. The Federalist Society

The Federalist Society began at Harvard Law School, the University of Chicago Law School, and the Yale Law School in 1982 as “a group of conservatives and libertarians dedicated to reforming the current legal order.”<sup>216</sup> It is committed to “the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.”<sup>217</sup> The student division includes “more than 5,000 law students at approximately 180 ABA-accredited law schools, including all of the top twenty law schools.”<sup>218</sup>

Anyone who participates in a Federalist Society conference will recall the silhouette of James Madison prominently displayed on the wall behind the speakers. One would expect, therefore, the Society to be dedicated to the principles of checks and balances and the doctrine of separated powers. Not so. The Society expresses little interest in those constitutional principles. Instead, energy is devoted to building support for what is called the Unitary Executive, a doctrine that places all executive power directly under the President and leaves no room for independent commissions, independent counsels, congressional involvement in administrative details, or statutory limitations on the President’s power to remove executive officials.<sup>219</sup> Members of the Federalist

213. Norman Podhoretz, *Making the World Safe for Communism*, COMMENTARY, Apr. 1976, at 35.

214. L. Gordon Crovitz, *How Ronald Reagan Weakened the Presidency*, COMMENTARY, Sept. 1988, at 25.

215. Charles Krauthammer, *The Price of Power*, NEW REPUBLIC, Feb. 9, 1987, at 23.

216. The Federalist Society for Law and Public Policy, *Our Background*, <http://www.fed-soc.org/ourbackground.htm> (last visited Mar. 26, 2006).

217. *Id.*

218. *Id.*

219. See, e.g., THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH (L. Gordon Crovitz & Jeremy A. Rabkin, eds., 1989); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997); Morton Rosenberg, *Congress’s Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive*, 57 G. W. L. REV. 627 (1989); Symposium, *The Presidency and Congress: Constitutionally Separated and*

Society are generally comfortable in vesting foreign affairs and the war power in the executive branch, allowing the President to initiate military action without legislative or judicial interference.

The problem with this position is that the Society also endorses with great fervor the belief in Original Intent. Federalist members believe that sound constitutional analysis requires an adherence to the intent of the Constitution as expressed through the Founding Fathers. How can the original intent of the Framers ever be squared with the concentration of the war power in the President? That is where John Yoo enters.

*C. John Yoo*

Currently a professor of law at the University of California at Berkeley (Boalt Hall), Yoo graduated from Yale Law School in 1992<sup>220</sup> and has had a meteoric career since then. He served as general counsel of the Senate Judiciary Committee, as a law clerk to Justice Clarence Thomas and Judge Laurence H. Silberman, and as a deputy assistant attorney general in the Office of Legal Counsel (OLC) of the U.S. Department of Justice from 2001 to 2003.<sup>221</sup> During his time with OLC he was closely involved in designing legal theories that expanded the President's powers as commander in chief and the drafting of what became known as the "torture memos" that circulated within the Bush administration.

The dilemma facing the Federalist Society—mixing Original Intent with presidential wars—was tackled head-on by John Yoo in an article for the *California Law Review* in March 1996. The "article" is in fact a monograph. It runs 139 pages and is adorned with 625 footnotes.<sup>222</sup> His dramatic, bold theme is captured in the summary that appears just before the introductory section. In response to recent legal criticism of executive initiatives in the war-making process, Yoo examined the historical and legal background of war powers in the Anglo-American world of the seventeenth and eighteenth centuries and concluded that "the Framers created a framework designed to encourage presidential initiative in war. Congress was given a role in war-making decisions not by the Declare War Clause, but by its power over funding and impeachment."<sup>223</sup> Federal courts "were to have no role at all."<sup>224</sup>

Law reviews are student-run publications. Thousands of manuscripts are submitted to the articles editors but they are not peer-reviewed by scholars and experts. Instead, the articles editors look through submitted articles and choose what to print. How do they react to a manuscript that is destined to run 139 pages, fastened down with 625 footnotes, and one that offers a legal theory not seen elsewhere? They are very likely to publish it, regardless of its merits or how tenable the argument. Articles editors, talented and bright as they are, cannot provide a professional, expert read of a manuscript. They are no more learned in British history and the war power than a student at a medical school. In fact, students at a medical school do not pretend to have

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*Shared Powers*, 68 WASH. U. L. Q. 485 (1990) (hosted by the Federalist Society).

220. University of California, Berkeley, School of Law-Boalt Hall, Profiles, <http://www.law.berkeley.edu/faculty/profiles/facultyProfile.php?facID=235> (last visited Mar. 27, 2005).

221. *Id.*

222. Yoo, *supra* note 43.

223. *Id.* at 170.

224. *Id.*

the competence to select and publish articles for a professional journal. Nor do students at any other graduate school.

By allowing the publication of articles that have not been scrutinized and evaluated by specialists, the law review provides "a uniquely fertile breeding ground for the development of defective constitutional analysis."<sup>225</sup> Editorial policy is often driven by a desire to publish articles "for their distinctiveness rather than their scholarly soundness."<sup>226</sup> During the Reagan administration, a number of conservatives promoted the idea of an "inherent item veto," which would allow the President to exercise an item veto without the need for statutory authority or a constitutional amendment.<sup>227</sup> This power, supposedly in existence ever since 1789, was not noticed until conservatives began advocating the idea in the 1980s.<sup>228</sup> Almost all of the groundswell came from articles published in law reviews.<sup>229</sup> The substantive arguments for the inherent item veto were so empty that the OLC, which generally defends executive power, issued a lengthy analysis in 1988 that found the concept wholly lacking in merit.<sup>230</sup>

On the hunt for originality, articles editors are eager to publish a manuscript that is likely to stimulate discussion, be cited by other law reviews, and perhaps be mentioned in decisions issued by federal or state courts. It is not at all unusual for a law review article, harebrained though it may be, to prompt dozens of counter-replies that go on for years until it is finally recognized by an exhausted readership that the ground is hopelessly arid. How this outpouring of articles contributes to scholarship, understanding, and progress is never explained.

One would have thought that even a twenty-three- or twenty-four-year-old articles editor at the *California Law Review*, having read Yoo's manuscript, would have asked: "If the framers created a framework designed to encourage Presidents to initiate war, limited Congress to decisions of funding and impeachment, and prohibited a role for the U.S. courts, why is the Constitution written as it is?" Surely articles editors must have some interest in the text of the Constitution. It may be too much to expect an articles editor to be aware of the extent to which the Framers broke with Blackstone and the British model, and perhaps too much to expect even an awareness of what the Framers said at the Philadelphia Convention and the ratifying conventions, but text matters because it shows how the Framers decided to allocate political power.

Moreover, it should have been within the competence of an articles editor to check Yoo's claim that the Constitution provided "no role at all" for the courts in war power disputes.<sup>231</sup> Looking initially at the first two decades, the student would have discovered the decisions of the Supreme Court in *Bas v. Tingy* (1800), *Talbot v.*

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225. Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349 (2000).

226. *Id.* at 376.

227. Robert J. Spitzer, *The Constitutionality of the Presidential Line-Item Veto*, 112 POL. SCI. Q. 261, 261-62 (1997).

228. *Id.*

229. Robert J. Spitzer, *Saving the Constitution From Lawyers*, in *POLITICS AND CONSTITUTIONALISM: THE LOUIS FISHER CONNECTION* 185, 187, 192-193, 201-202 (Robert J. Spitzer, ed., 2000); Spitzer, *supra* note 227, at 282.

230. 12 Ops. Off. Legal Counsel 128 (1988).

231. Yoo, *supra* note 43.

*Seeman* (1801), and *Little v. Barreme* (1804), where the Court looked exclusively to Congress for the meaning of the war power.<sup>232</sup> In the latter case, the Court decided that when a collision occurs in time of war between a presidential proclamation and a congressional statute, the statute trumps the proclamation.<sup>233</sup>

An easy computer search by an articles editor of those two decades would have uncovered the *Smith* case in 1806, where a federal circuit court forcefully rejected the argument that the President could ignore and countermand the Neutrality Act of 1794. "The [P]resident," said the court, "cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids."<sup>234</sup> The circuit court clearly understood the difference between the defensive powers of the President and the offensive powers of Congress. There was "a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war."<sup>235</sup> Does the President, the court asked, "possess the power of making war? That power is exclusively vested in [C]ongress . . . ."<sup>236</sup> The judiciary understood those basic principles.

In 1807, Chief Justice John Marshall wrote for the Court in a case involving a motion for habeas corpus to bring up Samuel Swartwout and Erick Bollman, both charged with treason for levying war against the United States. Marshall, after first noting that the power of a U.S. court to award the writ "must be given by written law" (i.e., by Congress), found that the authority existed in Section 14 of the Judiciary Act of 1789.<sup>237</sup> He underscored the plenary prerogative of Congress over the decision to suspend the writ:

If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.<sup>238</sup>

On this matter of the war power, the Court again sought guidance solely from the actions of Congress. Following the decision, the two prisoners were brought before the Court, where it was decided that there was insufficient evidence to justify the commitment of either one on the charge of treason in levying war against the U.S.<sup>239</sup> In this manner the Court announced two principles. It looked to Congress for the authority to suspend the writ in time of emergency, and it used its judicial power to require the executive branch to release the prisoners and have them brought before the Court for

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232. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 39–46 (1800).

233. *Little*, 6 U.S. (2 Cranch) at 179.

234. *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).

235. *Id.* at 1230.

236. *Id.*

237. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807).

238. *Id.* at 101.

239. *Id.* at 135.

independent judicial scrutiny. The President and the executive branch possessed no sole or exclusive powers over war or national emergencies.

Armed with this elementary information, an articles editor should have put this question to Yoo: "If the courts were to have 'no role at all' in war power matters, how do you explain the decisions by the Supreme Court in 1800, 1801, 1804, and 1807, and the decision by the federal circuit court in 1806?" Any professional reviewer would have been aware of those decisions. Apparently the articles editors at the prestigious *California Law Review* were not, or perhaps decided not to confront Yoo. Of those five seminal decisions, Yoo in his 625 footnotes mentions only three. He cites *Bas* for the distinction between a "perfect war" (a declared war) and an "imperfect war" (an undeclared war).<sup>240</sup> He cites *Little* but omits any mention of how the Supreme Court decided that a federal statute in time of war was superior to a presidential proclamation.<sup>241</sup> Toward the end of the article, where he mentions *Bas*, *Talbot*, and *Little*, he rejects the position of commentators who regarded those opinions, "particularly *Little*, as contemporaneous evidence showing that courts can exercise jurisdiction over war power cases."<sup>242</sup> Articles editors could have read those decisions (each of them quite short) to determine if the commentators had a point. It appears that they chose to remain at arms length from evidence and limit their review to assuring that the citation was correctly entered.

How does Yoo reconcile those decisions with his position that federal courts have "no role at all" in war power disputes?<sup>243</sup> He explained that none of the three cases "called upon the Supreme Court to decide that the President was waging war in violation of the Constitution, or that Congress had failed to declare that a state of war existed, or that courts could step in to adjudicate inter-branch disputes over war."<sup>244</sup> He tries to escape the obvious problem by changing the subject. The three cases clearly show that federal courts *do* have a role in war power disputes. Second, the five cases I singled out demonstrate that the courts understood that under the Constitution the President *could not* initiate war against another country. That judgment was reserved to Congress. Contrary to Yoo's suggestion, the Supreme Court did not have to decide that the President was waging war in violation of the Constitution because no President attempted to do that. They knew better. So did the courts and so did Congress. Third, the Court did not have to decide that Congress had failed to declare that a state of war existed. The Court simply ruled that Congress had a choice. It could authorize war or it could declare it. Fourth, in *Little* the Court clearly stepped in to adjudicate an inter-branch dispute over war and ruled that a statute is superior to a proclamation. Why didn't some of those thoughts occur to the articles editor, particularly during the multiple layers of review for a submitted manuscript?

Yoo discussed *Bas*, *Talbot*, and *Little* again on a separate page, quoting from both *Bas* and *Talbot*<sup>245</sup> but ignoring Chief Justice Marshall's statement in *Talbot* that the "whole powers of war being, by the constitution of the United States, vested in [C]ongress, the acts of that body can alone be resorted to as our guides in this

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240. Yoo, *supra* 43, at 205 n.202.

241. *Id.* at 245 n.379.

242. *Id.* at 293 nn.573–575.

243. *Id.* at 205 n.201.

244. *Id.* at 293.

245. *Id.* at 294.



inquiry.”<sup>246</sup> There was room for 625 footnotes but not for that one. The closest that Yoo can come to acknowledging Marshall’s statement is this comment, dropped in a footnote: “To be sure, these decisions contain dicta that could support arguments for exclusive congressional power over war.”<sup>247</sup> Dicta consists of remarks that are extraneous to a holding. Marshall’s omitted sentence goes to the heart of constitutional authority over war, which he finds solely in Congress.

In this same footnote, Yoo decides to critique what other scholars have said about *Little*. He said that “[c]ritics of modern presidential war powers have read *Little* as standing for two propositions: (i) that courts can hear war powers cases, and (ii) that Congress can regulate the conduct of war even if Congress’ regulations conflict with presidential orders.”<sup>248</sup> Yoo charges that these scholars “surely over-read *Little*.”<sup>249</sup> Why is that? He says that “[t]he Court could hear the case because it involved maritime and prize jurisdiction, which the text of the Constitution grants to the federal courts. Thus, the case did not really call upon the Court to pass judgment on the exercise of war powers, and thus did not present a political question.”<sup>250</sup>

Once again Yoo changes the subject. He ignores the fact that the case *did* call upon the Justices to pass judgment on the exercise of war powers, and it surely presented a political question in the sense that the Court upheld a congressional statute over a conflicting presidential proclamation in time of war. Congress passed legislation authorizing the President to seize vessels sailing to French ports.<sup>251</sup> Captain Little followed a proclamation issued by President Adams directing American ships to capture vessels sailing to or from French ports.<sup>252</sup> Little followed Adams’s order and was sued for damages. Yoo writes: “The Court did not enjoin enforcement of the President’s order, but instead merely found that Captain Little was personally liable for damages.”<sup>253</sup> That is disingenuous. The Court did not enjoin enforcement of the President’s proclamation because the “Quasi-War” (from 1798 to 1800) was over. There was nothing to enjoin. Furthermore, the Court found Captain Little personally liable for damages because Little mistakenly followed a presidential proclamation instead of a congressional statute.

A final quote from Yoo appears in this footnote: “*Little* never reached questions concerning the justiciability of inter-branch war powers disputes, or the President’s inherent authority to order captures going beyond Congress’ commands.”<sup>254</sup> Both parts of that sentence are false. Obviously the Court *did* reach questions concerning the justiciability of interbranch war powers disputes. The Court upheld a congressional statute over a conflicting presidential proclamation. Moreover, the Court *did* reach the question of the President’s inherent authority to order captures going beyond the statutory authority of Congress. In deciding in favor of the statute, the Court dismissed any possible claim of the President possessing inherent authority in the dispute being

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246. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801).

247. Yoo, *supra* note 43, at 294 n.584.

248. *Id.* at 295 n.584.

249. *Id.*

250. *Id.*

251. Act of Feb. 9, 1799, ch. 2, § 5, 1 Stat. 613, 615.

252. Little v. Barreme, 6 U.S. (2 Cranch) 170, 171 (1804).

253. Yoo, *supra* note 43, at 295 n.584.

254. *Id.*

adjudicated. As to some other invocation of inherent presidential authority in some other dispute, there was no reason for the Court—or any court—to decide questions not placed before it. Yoo knew that as well as anyone. The articles editors should have known it as well.

As to the role of courts in war power disputes, Yoo argued that “[n]o provision [of the Constitution] explicitly authorizes the federal courts to intervene directly in war powers questions.”<sup>255</sup> It is remarkable that an articles editor would not have challenged that sentence by pointing out that nothing in the Constitution explicitly authorizes the federal courts to intervene directly in questions of the Commerce Clause, the taxing power, and other constitutional disputes that are regularly adjudicated in federal courts. Nothing in the Constitution explicitly authorizes Congress to investigate, to issue subpoenas, or to hold executive officers in contempt, activities that Congress engages in regularly.<sup>256</sup> Nothing in the Constitution explicitly authorizes the President to remove top executive officials, an implied power that courts have long recognized.<sup>257</sup>

Does Yoo really attempt to interpret the Constitution solely on the basis of explicit powers and therefore deny the existence of implied powers? It is possible to make that argument, even if it flies in the face of two centuries of constitutional history. Yet it would do away with many everyday activities, including the power of judicial review, which is not explicitly stated in the Constitution. Equally serious, if Yoo decided to limit himself to explicit powers, he could not find in the Constitution an explicit power that allowed the President to initiate wars.

In his new book, *The Powers of War and Peace*, Yoo pulls together his many writings published over the past decade. He continues to depend on the British model and a concentration of power in the presidency. Several times he uses the phrase “unitary rational actor” to support centralizing foreign affairs and the war power in the President.<sup>258</sup> I find it intriguing, and jolting, that a conservative would want to rely on anything as abstract and as academic as the Unitary Rational Model. On a fundamental point, he classifies “foreign affairs as an executive power.”<sup>259</sup> Because of anarchy and threats in the international system, the management of foreign affairs must be vested “in a unitary, rational actor.”<sup>260</sup> He further argues: “a unitary rational actor remains an ideal to guide foreign policy. It seems obvious that the presidency best meets the requirements for taking rational action on behalf of the nation in the modern world.”<sup>261</sup>

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255. *Id.* at 176.

256. LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 3–25, 91–134 (2004) (citing such cases as *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 509 (1975), *McGrain v. Daugherty*, 272 U.S. 135, 175 (1927), *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1881), and *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 228 (1821)).

257. LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 49–77 (4th ed., rev. 1997) (citing such cases as *Wiener v. United States*, 357 U.S. 349 (1958), *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), *Myers v. United States*, 272 U.S. 52 (1926), and *Shurtleff v. United States*, 189 U.S. 311 (1903)).

258. JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 20 (2005).

259. *Id.*

260. *Id.*

261. *Id.*

It is not obvious to me. There are two major problems: one of theory, the other of practice. On the first point, the framers did not trust in a unitary, rational actor. They distrusted human nature and feared the concentration of power, especially over war. For that reason they developed a system of separation of powers, checks and balances, and an independent judiciary. As to practice, take a look at the last three major wars—Korea, Vietnam, and the second Iraq war—and one does not see the hand of a unitary, rational actor. Instead, those military operations are associated with miscalculations, misconceptions, deception, reliance on false information, a failure to understand the enemy, and an inability to plan for and carry out a war. There is nothing remotely rational about any of those conflicts. Not only were they damaging and injurious to the national interest, they were damaging and injurious to the incumbent Presidents and their political parties. It is not possible to associate the three wars with rationality or with informed, expert judgment, as one would expect with a Unitary Rational Actor. The wars are characterized by incompetence. John Jay and the framers foresaw all of that.

Yoo mentions John Jay's "haughty praise of the vesting of foreign affairs powers in the best and brightest."<sup>262</sup> Yet in his Federalist No. 4, Jay plainly rejects entrusting foreign affairs and the war power to the best and the brightest.<sup>263</sup> In an ironic twist, haughtiness and elitism fit Yoo's own model of the Unitary Rational Actor. Admittedly, Yoo described the model as an "ideal."<sup>264</sup> It is not an ideal embodied anywhere in the Constitution, and it is not an ideal that finds support in the conduct of American wars of the post-World War II period. The notion of the Unitary Rational Actor, however, does show up in the OLC memos that Yoo helped write and in the argument that the President, as commander in chief in time of war, cannot be constrained by statutes or by treaties.

More could be said in analyzing Yoo's article in the *California Law Review* and I have done so elsewhere.<sup>265</sup> The central point here is to understand the lengths to which Yoo would go in arguing that the Framers created a framework that encouraged Presidents to initiate wars, limited the legislative checks available to Congress, and left "no role at all" for federal courts. That interpretation of presidential government would reappear after 9/11 when Yoo helped draft the "torture memos" for the Department of Justice.

#### *D. The Torture Memos*

Two weeks after the terrorist attacks of 9/11, Yoo, in his capacity as Deputy Assistant Attorney General, wrote a "Memorandum Opinion for the Deputy Counsel to the President," dated September 25, 2001.<sup>266</sup> He argued that the President "has the constitutional power not only to retaliate against any person, organization, or State

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262. *Id.* at 130.

263. *See supra* note 32 and accompanying text.

264. YOO, *supra* note 258, at 20.

265. Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1658–68, 1671 (2000).

266. Op. Off. Legal Counsel, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (2001) <http://www.usdoj.gov/olc/warpowers925.htm> (last visited Jan. 28, 2006).

suspected of involvement in terrorist attacks on the United States, but also against foreign States suspected of harboring or supporting such organizations.”<sup>267</sup> Moreover, “[t]he President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific incidents of September 11.”<sup>268</sup> Interpreting constitutional power in that manner would justify President Bush using military force against such countries as Egypt, Iran, Iraq, Saudi Arabia, Syria, and Yemen, to name just a few places that immediately come to mind.

According to Yoo’s memo, “[d]uring the period leading up to the Constitution’s ratification, the power to initiate hostilities and to control the escalation of conflict had long been understood to rest in the hands of the executive branch.”<sup>269</sup> What legal and constitutional support does Yoo cite for that broad and far-reaching proposition? Why, it is his 1996 article for the *California Law Review*! The problem with his analysis is that in the period leading up to the Constitution’s ratification, *there was no executive branch in America*. There was only the Continental Congress, which exercised all three powers: legislative, executive, and judicial.<sup>270</sup>

Yoo’s memo often goes beyond legal analysis to make broad assertions about military force. He said “[t]here can be no doubt that the use of force protects the Nation’s security and helps it achieve its foreign policy goals.”<sup>271</sup> That cannot be said about such wars as Vietnam. There is good reason why it cannot be said about the current Iraq War. In looking to the effect of such statutes as the War Powers Resolution and the joint resolution of September 14, 2001, which authorized war against Afghanistan, Yoo stated that neither statute “can place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.”<sup>272</sup> That follows under Yoo’s constitution, but not under the U.S. Constitution.

These broad assertions of presidential authority would reappear in other OLC memos that Yoo either authored, coauthored, or to which he contributed. A memo of December 28, 2001, written by Yoo and Patrick F. Philbin, another OLC deputy, was directed to William J. Haynes II, General Counsel of the Department of Defense. It concludes that “the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at GBC [Guantánamo Bay, Cuba].”<sup>273</sup> That line of analysis, rejected by the Supreme Court in *Rasul v. Bush*,<sup>274</sup> would have allowed executive officials to conduct interrogations and military tribunals without any interference from federal courts.

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267. *Id.*

268. *Id.*

269. *Id.*

270. LOUIS FISHER, PRESIDENT AND CONGRESS 6–17 (1972).

271. Op. Off. Legal Counsel, *supra* note 266.

272. *Id.*

273. Memorandum from Patrick F. Philbin and John C. Yoo, Office of Legal Counsel, U.S. Dep’t of Justice, to William J. Haynes, II, Gen. Counsel, Dep’t of Def., Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba, at 1 (Dec. 28, 2001), *available at* <http://www.texscience.org/reform/torture/philbin-yoo-habeas-28dec01.pdf>

274. 542 U.S. 466, 485 (2004).

Yoo teamed up with another OLC attorney, Robert J. Delahunty, to send a second memo to Haynes on January 9, 2002. This one concerned the application of treaties and laws to al Qaeda and Taliban detainees. Yoo and Delahunty concluded that such treaties as the Geneva Conventions and various statutes “do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that these treaties do not apply to the Taliban militia.”<sup>275</sup> Treaty provisions, including prohibitions on physical or mental torture, coercive interrogations, acts of violence, inhumane treatment, and any form of cruelty,<sup>276</sup> would not apply. Nor could Congress, by statute, interfere with the President’s authority over detainees: “Any congressional effort to restrict presidential authority by subjecting the conduct of the U.S. Armed Forces to a broad construction of the Geneva Convention, one that is not clearly borne by its text, would represent a possible infringement on presidential discretion to direct the military.”<sup>277</sup>

These legal and constitutional analyses by Yoo led directly to a fifty-page memo written by OLC head Jay S. Bybee, prepared for White House Counsel Alberto Gonzales and dated August 1, 2002. Bybee advised Gonzales that for an act to constitute torture “it must inflict pain that is difficult to endure.”<sup>278</sup> Physical pain amounting to torture “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”<sup>279</sup> Bybee incorporated Yoo’s definition of presidential power in time of war.<sup>280</sup> Because this power, as read by Bybee and Yoo, comes from the Constitution, no statute or treaty can limit it. The problem for Bybee and Yoo was to demonstrate, in a credible way, how those powers are derived from the Constitution and how such a concentration of power could coexist with the rule of law and democratic government.

These OLC legal interpretations greatly influenced the Working Group that Defense Secretary Donald Rumsfeld established on January 15, 2003. It was directed “to assess the legal, policy, and operational issues relating to the interrogation of detainees held by the U.S. Armed Forces in the war on terrorism.”<sup>281</sup> When the report of the Working

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275. Memorandum from John C. Yoo and Robert J. Delahunty, Office of Legal Counsel, U.S. Dep’t of Justice, to William J. Haynes, II, Gen. Counsel, Dep’t of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees, at 1 (Jan. 9, 2002), available at <http://www.texscience.org/reform/torture/yoo-delahunty-9jan02.pdf>

276. Geneva Convention Relative to the Treatment of Prisoners of War, Articles 13, 17, 87, 99 Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www.unhchr.ch/html/menu3/b/91.htm>.

277. Yoo & Delahunty, *supra* note 275, at 11.

278. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 1 (Aug. 1, 2001), available at <http://www.texscience.org/reform/torture/bybee-olc-torture-1aug02.pdf>.

279. *Id.*

280. “[A] statute would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy.” *Id.* at 31.

281. Memorandum from the Office of the Sec’y of Defense to the Gen. Counsel of the Dep’t of Defense, Re: Detainees Interrogations (Jan. 15, 2003, declassified June 21, 2004), available at <http://www.washingtonpost.com/wp-srv/nation/documents/011503rumsfelda.pdf>.

Group was released, first as a draft on March 6, 2003 and later as a final report on April 4, 2003, they showed the marked impact of OLC analysis of presidential power, treaties, and statutes. Both reports state that the torture statute “does not apply to the conduct of U.S. personnel at Guantanamo,” and both interpret the torture statute as not applying “to the President’s detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.”<sup>282</sup> From these legal memos it was a short step to the torture of detainees at Guantánamo Bay, Afghanistan, and Iraq, including the notorious prison at Abu Ghraib.<sup>283</sup>

The shoddy quality of the memos produced by OLC and the Working Group, eventually made available on the Internet, forced the administration into a partial retreat. At a press briefing on June 22, 2004, White House Counsel Gonzales and three other executive officials met with reporters to clarify and modify what agency lawyers had been arguing. Gonzales said that to the extent that some of the documents “in the context of interrogations, explored broad legal theories, including legal theories about the scope of the President’s power as Commander-in-Chief, some of their discussion, quite frankly, is irrelevant and unnecessary to support any action taken by the President.”<sup>284</sup>

That seemed aimed at the OLC memos and the Working Group reports. Gonzales continued: “Unnecessary, over-broad discussions in some of these memos that address abstract legal theories, or discussions subject to misinterpretation, but not relied upon by decision-makers are under review, and may be replaced, if appropriate, with more concrete guidance addressing only those issues necessary for the legal analysis of actual practices.”<sup>285</sup> At the end of the year, OLC released a memo announcing legal standards applicable under federal law governing torture.<sup>286</sup> The memo called torture “abhorrent both to American law and values and to international norms.”<sup>287</sup> The memo, superceding the Jay Bybee August 2002 memo, concluded that the discussion in the latter memo “concerning the President’s Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, [and] has been eliminated from the analysis that follows.”<sup>288</sup> Elimination does not mean repudiation, but the new OLC memo did recognize that congressional statutes defining torture were binding on the executive branch: “We must, of course, give effect to the statute as enacted by Congress.”<sup>289</sup>

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282. LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER* 207–08 (2005).

283. *Id.* at 198–209.

284. Press Briefing by White House Counsel Judge Alberto Gonzales, DOD General Counsel William Haynes, DOD Deputy General Counsel Daniel Dell’Orto, and Army Deputy Chief of Staff for Intelligence Gen. Keith Alexander (June 22, 2004), [hereinafter Press Briefing] available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/06-22-2>.

285. *Id.*

286. Memorandum from Daniel Levin, Acting Assistant Attorney Gen. for the Office of Legal Counsel, to James B. Comey, Deputy Attorney Gen., Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/dagmemo.pdf>.

287. *Id.* at 1.

288. *Id.* at 2.

289. *Id.* at 4.

In his June 22, 2004 press briefing, Gonzales set the record straight on several issues. He referred to the Bush memo of February 7, 2002 as “the only formal, written directive from the President regarding treatment of detainees.”<sup>290</sup> However, he also said that the briefing “does not include CIA activities.”<sup>291</sup> When one of the reporters asked, “Are we wrong to assume then, that the CIA is not subject to these categories of interrogation technique,” Gonzales replied that he was not going “to get into questions related to the CIA.”<sup>292</sup> His response gave clear implication that the White House had two standards, applying one rule to interrogations conducted by the Defense Department and another by the CIA. The distinction would come into greater focus when the press learned that the CIA had taken certain detainees out of the country to be interrogated elsewhere.

### E. “Extraordinary Rendition”

Broad interpretations of the President’s power as commander in chief in time of war, as fashioned by John Yoo and his colleagues in the Bush administration, bore fruit in another area: “extraordinary rendition,” or the sending of detainees to another country for interrogation and possible torture. The question first arises as to the adjective “extraordinary.” What does it add? It is needed to distinguish it from customary rendition, under which a President could render—or send—someone to a foreign jurisdiction. A series of opinions by Attorneys General concluded that Presidents may not act under some form of implied, inherent, or extraconstitutional authority. They needed authority granted either by treaty or a law passed by Congress.<sup>293</sup> As recently as 1979 the Office of Legal Counsel decided that the President “cannot order any person extradited unless a treaty or statute authorizes him to do so.”<sup>294</sup>

“Extraordinary rendition” therefore enters into the realm of presidential law, where the President acts not only in the absence of statutory or treaty law but even in the face of restrictive statutes or treaties. Under the theory of extraordinary rendition, the President is at liberty to ignore and violate any statute or treaty that interferes with what he decides is necessary to accomplish his objectives while operating as Commander in Chief in time of war. In this area it is presidential government, pure and simple, unconstrained by domestic or international law.

Officials in the Bush administration defended the need to detain and interrogate suspected terrorists outside the country. James L. Pavitt, after retiring from the CIA in

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290. Press Briefing, *supra* note 284, at 4.

291. *Id.*

292. *Id.* at 21. See Mike Allen and Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed*, WASH. POST, June 23, 2004, at 1; Richard W. Stevenson, *White House Says Prisoner Policy Set Humane Tone*, N.Y. TIMES, June 23, 2004, at A1.

293. See, e.g., 3 Op. Att’y Gen. 661 (1841) (the President depending on authority by a law or treaty to surrender someone to a foreign jurisdiction); 2 Op. Att’y Gen. 559 (1833) (requiring a law or treaty for extradition); 1 Op. Att’y Gen. 68, 69–70 (1797) (“[H]aving omitted to make a law directing the mode of proceeding, I know not how, according to the present system, a delivery of such offender could be effected. . . . This defect appears to me to require a particular law.”).

294. 4A Op. O.L.C. 149 (1979).

August 2004, claimed that the policy of extraordinary rendition had been done in consultation with the National Security Council and disclosed to the appropriate congressional oversight committees.<sup>295</sup> Detailed stories described the use of airplanes by the CIA to transfer detainees to other countries for interrogation.<sup>296</sup> In a statement on March 7, 2005, Attorney General Alberto Gonzales defended extraordinary rendition, adding that U.S. policy is not to send detainees “to countries where we believe or we know that they’re going to be tortured.”<sup>297</sup> He also conceded that the administration “can’t fully control” what other nations do.<sup>298</sup> Individuals who had been subjected to extraordinary rendition, and were later released, reported that they had been tortured.<sup>299</sup> Foreign governments began to object that their countries were being used for the “degrading and inhuman treatment” of detainees through the rendition policy.<sup>300</sup>

Critical stories about extraordinary rendition appeared with increasing frequency, and intensity, throughout November 2005.<sup>301</sup> In an effort to rebut this criticism, Secretary of State Condoleezza Rice presented the administration’s views in a detailed statement on December 5, 2005. Because of language that was artfully phrased, her answers generated more questions. She said that “[o]ne of the difficult issues in this new kind of conflict is what to do with captured individuals who we know or believe to be terrorists.”<sup>302</sup> Many individuals “believed” to be terrorists, and found not to be, were released from CIA interrogation prisons after being subjected to treatment they regarded as torture. Rice maintained that “[f]or decades, the United States and other countries have used ‘renditions’ to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice.”<sup>303</sup> Those renditions were authorized by statute or by treaty, not by independent presidential assertions of authority, and the renditions

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295. Dana Priest, *Ex-CIA Official Defends Detention Policies*, WASH. POST, Oct. 27, 2004, at A21.

296. Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, March 6, 2005, at 1; Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14 & 21, 2005, at 106; Dana Priest, *Jet Is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004, at A1.

297. R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, March 8, 2005, at A3.

298. *Id.*

299. Dana Priest, *CIA’s Assurances On Transferred Suspects Doubted*, WASH. POST, March 17, 2005, at A1.

300. Craig Whitlock, *New Swedish Documents Illuminate CIA Action*, WASH. POST, May 21, 2005, at A1. *See also* Craig Whitlock, *Europeans Investigate CIA Role in Abductions*, WASH. POST, March 13, 2005, at A1.

301. *See* Glenn Kessler, *U.S. Will Address E.U. Questions on CIA Prisons*, WASH. POST, Nov. 30, 2005, at A1; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; Dana Priest and Josh White, *Policies on Terrorism Suspects Come Under Fire*, WASH. POST, Nov. 3, 2005, at A2; Craig Whitlock, *Europeans Probe Secret CIA Flights*, WASH. POST, Nov. 17, 2005, at A22.

302. Condoleezza Rice, U.S. Sec’y of State, Remarks Upon Her Departure for Europe, (Dec. 5, 2005), available at <http://www.state.gov/secretary/rm/2005/57602.htm> [hereinafter Rice Remarks].

303. *Id.*



were carried out according to traditional judicial procedures. She recognized this distinction with these words: "there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition [subject to judicial supervision] is not a good option."<sup>304</sup> Her language blurs the difference between renditions authorized by statute or by treaty and those that rely on purely executive assertions of authority.

Rice claimed that rendition "is not unique to the United States, or to the current administration," and offered two examples where suspected terrorists were transferred from one country to another.<sup>305</sup> Ramzi Youssef was brought to the United States after being charged with the 1993 bombing of the World Trade Center and plotting to blow up airlines over the Pacific Ocean. "Carlos the Jackal," captured in Sudan, was brought to France.<sup>306</sup> She neglected to add that the purpose of rendition was not to take them to a secret interrogation center, outside the judicial process, but to bring them to court to face public charges, trial, conviction, and sentencing.

Other comments by Rice caused concern. First, she said that "[t]he United States does not permit, tolerate, or condone torture under any circumstances."<sup>307</sup> That may be U.S. "policy" but it is not, clearly, U.S. practice. Second, she said that "[t]he United States has respected—and will continue to respect—the sovereignty of other countries."<sup>308</sup> It did not respect the sovereignty of Iraq by going to war in March 2003 with strained and unproved claims about weapons of mass destruction.<sup>309</sup> Third, she claimed that "[t]he United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture."<sup>310</sup> That may not be the purpose but it may be the effect, especially when the United States admits that it cannot fully control what other nations do. Fourth, she stated that "[t]he United States does not use the airspace or the airports of any country for the purpose of transporting a detainee to a country where he or she will be tortured."<sup>311</sup> Same response. Fifth, she said that "[w]ith respect to detainees, the United States Government complies with its Constitution, its laws, and its treaty obligations. Acts of physical or mental torture are expressly prohibited."<sup>312</sup> The memos prepared by the Justice Department and the Working Group in the Pentagon provide little comfort or confidence to accept that statement at face value.

Rice referred to "the horrible mistreatment of some prisoners at Abu Ghraib that sickened us all and which arose under the different legal framework that applies to armed conflict in Iraq."<sup>313</sup> Different legal framework? As the Bush administration admitted, Iraq (unlike al Qaeda) was a signatory to the Geneva Conventions and was entitled to its protections. Rice added that in the case of Abu Ghraib "the United States

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304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. See Louis Fisher, *Justifying War Against Iraq*, in *RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS* 289–313 (James A. Thurber, ed., 2005).

310. Rice Remarks, *supra* note 302.

311. *Id.*

312. *Id.*

313. *Id.*

has vigorously investigated, and where appropriate, prosecuted and punished those responsible.”<sup>314</sup> That is only partially true. Punishment has been meted out to a handful of individuals—primarily lower level soldiers—but not to the senior civilian and military leaders who were responsible for designing and implementing the interrogation policies carried out at Guantánamo, Afghanistan, and Iraq. Major policymakers went untouched. Unless and until punishment is applied to public officials who design interrogation systems that are inhumane, a system of accountability and responsibility does not exist, and continued examples of torture can be expected.

The major point of Rice’s address seemed to be to defend the interrogation methods used by the United States: “The intelligence so gathered has stopped terrorist attacks and saved innocent lives—in Europe as well as in the United States and other countries. The United States has fully respected the sovereignty of other countries that cooperate in these matters.”<sup>315</sup> The later point seems to imply that if other countries “cooperate” in harsh interrogation techniques, there should be no grounds to object. Finally, Rice said that “[t]he United States is a country of laws. My colleagues and I have sworn to support and defend the Constitution of the United States. We believe in the rule of law.”<sup>316</sup> Her rhetoric collides with the administration’s theory of presidential power, particularly when operating under the Commander in Chief Clause. The officials who developed that theory and authorized interrogation techniques also took an oath to support and defend the Constitution.

## VI. THE SECOND IRAQ WAR

The factors discussed above promoted independent presidential decisions to go to war. The second war against Iraq, however, was particularly fueled by neoconservative ideology. Many of them thought that President George H. W. Bush had made a grievous error in 1991 by not taking the fight directly to Baghdad to unseat Saddam Hussein. For these neoconservatives, that unfinished business needed to be tended to by the second Bush administration. They also advocated U.S. superiority over the rest of the world. Michael Ledeen wrote in the *Weekly Standard* in 1996: “our foreign policy must be ideological—must be designed to advance freedom. . . . In these days of multicultural relativism, it is unfashionable to state openly what the rest of the world takes for granted: the superiority of American civilization.”<sup>317</sup>

### A. *National Security Strategy*

The belief in American exceptionalism helped spur and justify the second Iraq war, and it colored the National Security Strategy issued by the Bush administration in 2002. Along the way, neoconservatives were drafting muscular versions of foreign and military policy. In 1992, toward the end of the first Bush administration, Paul

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314. *Id.*

315. *Id.*

316. *Id.*

317. Michael A. Ledeen, *A Republican Contract With the World*, WKLY. STANDARD, May 13, 1996, at 25. See also Julie Kosterlitz, *The Neoconservative Moment*, NAT’L J., May 17, 2003, at 1542.

Wolfowitz, Lewis Libby, and Zalmay Khalilzad produced a Pentagon document called the Defense Planning Guidance. A draft copy, leaked to the press, envisioned the United States as the globe's only superpower, capable of using its military might to advance and protect U.S. interests. After running into strong criticism, the draft was rewritten and toned down.<sup>318</sup> The strong military edge, however, would reappear in subsequent documents prepared by neoconservatives.

Just as there are many kinds of Straussian, so is there a range of views among neoconservatives. Yet even conservatives who object to generalizations about neoconservatives (e.g., neoconservatives have "taken over" American foreign policy) acknowledge that the foreign policy of the Bush administration after 9/11 "can accurately be characterized as neoconservative, guided as it is by the idea that America should transform despotic polities into liberal democracies."<sup>319</sup> Neoconservatives put their political agenda front and center. Writing in 1996, William Kristol and Robert Kagan advocated a "neo-Reaganite" foreign policy. That meant hefty increases in military spending, "greater moral clarity," and a need to champion "American exceptionalism."<sup>320</sup> Here is a key phrase used to justify America's preeminent military role in the post-Cold War world: "Benevolent global hegemony." For those who considered such language as "either hubristic or morally suspect," Kristol and Kagan explained that a hegemon "is nothing more or less than a leader with preponderant influence and authority over all others in its domain."<sup>321</sup> When Russia and China denounce U.S. "hegemonism," neoconservatives accept this criticism "as a compliment and guide to action."<sup>322</sup> For those who object to the United States glorifying the notion of dominance and the use of military force, Kristol and Lawrence Kaplan reply: "Well, what is wrong with dominance, in the service of sound principles and high ideals?"<sup>323</sup>

Neoconservatives offered many reasons for overthrowing Saddam Hussein. Writing in 1999, David Wurmser devoted much of his analysis to Hussein's "pernicious, extortionist character" and his "brutal use" of force against Iraqi citizens and neighboring countries.<sup>324</sup> Citing Hussein's bloody record was a convenient way to build public support for military action, but Wurmser recognized a U.S. interest in Iraq that had nothing to do with whether an immoral tyrant was in power:

A nation of 22 million, Iraq occupies some of the most strategically blessed and resource-laden territory of the Middle East. It is a key transportation route, and it is rich in both geographic endowments and human talent. Its location on pathways between Asia and Europe, Africa and Asia, and Europe and Africa makes it an ideal route for armies, pipelines, and trade from both the eastern Mediterranean

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318. MANN, *supra* note 198, at 208–15.

319. Ramesh Ponnuru, *Getting to the Bottom of This 'Neo' Nonsense*, NAT'L REV., June 16, 2003, at 29.

320. William Kristol & Robert Kagan, *Toward a Neo-Reaganite Foreign Policy*, 75 FOREIGN AFF. 18, 19 (1996).

321. *Id.*

322. *Id.* at 20.

323. LAWRENCE F. KAPLAN & WILLIAM KRISTOL, *THE WAR OVER IRAQ: SADDAM'S TYRANNY AND AMERICA'S MISSION* 112 (2003).

324. DAVID WURMSER, *TYRANNY'S ALLY: AMERICA'S FAILURE TO DEFEAT SADDAM HUSSEIN* 116 (1999).

and Asia Minor to the Persian Gulf. Iraq also has large, proven oil reserves, water, and other important resources.<sup>325</sup>

In a book edited in 2000, Kristol and Kagan set forth an ambitious and bellicose agenda, as did the authors who contributed essays (including Elliott Abrams, Richard Perle, and Paul Wolfowitz). Regarding Iraq, Kristol and Kagan objected that President George H. W. Bush “failed to see that mission through to its proper conclusion: the removal of Saddam from power in Baghdad.”<sup>326</sup> U.S. troops should have been kept in Iraq “long enough to ensure that a friendlier regime took root.”<sup>327</sup> A section on “regime change” encouraged “a broad strategy of promoting liberal democratic governance throughout the world.”<sup>328</sup> Military action against Iraq would be the first of several steps.

Much of the neoconservative framework appears in *The National Security Strategy of the United States of America*, released by the Bush administration in September 2002. It bristles with the doctrines of preemption, preventive war, military superiority, and U.S. preeminence in world affairs. The report explains that the United States embodies certain intrinsic truths and that it has a moral and political obligation to spread those truths to other countries, using military force if necessary.

The introduction by President Bush begins by identifying “a single sustainable model for national success: freedom, democracy, and free enterprise.”<sup>329</sup> That model, according to Bush, does not merely apply to the United States and its allies. It is a model for the entire world. Thus, the “values of freedom are right and true for every person, in every society—and the duty of protecting these values against their enemies is the common calling of freedom-loving people across the globe and across the ages.”<sup>330</sup>

In his introductory statement, Bush claimed that the United States will “not use our strength to press for unilateral advantage.”<sup>331</sup> That was false. Within a year U.S. troops would use offensive force against Iraq and threaten military action against Iran and Syria. Bush said that America will create a balance of power and conditions “in which all nations and all societies can choose for themselves the rewards and challenges of political and economic liberty.”<sup>332</sup> The word “choice” is misleading, as evident by the war against Iraq. In fighting “terrorists and tyrants,” the United States “will hold to account nations that are compromised by terror, including those who harbor

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325. *Id.* at 117.

326. William Kristol & Robert Kagan, *Introduction: National Interest and Global Responsibility*, in PRESENT DANGERS: CRISIS AND OPPORTUNITY IN AMERICAN FOREIGN AND DEFENSE POLICY 6 (Robert Kagan and William Kristol eds., 2000).

327. *Id.* at 19.

328. *Id.* at 17.

329. President George W. Bush, *Introductory Remarks to THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 1 (Sept. 2002), available at <http://www.whitehouse.gov/ncs/nss.pdf>.

330. *Id.*

331. *Id.*

332. *Id.*

terrorists—because the allies of terror are the enemies of civilization.”<sup>333</sup> That signals a further threat of military force.

Bush ended his statement by calling freedom “the non-negotiable demand of human dignity; the birthright of every person—in every civilization.”<sup>334</sup> In what could be read as an American jihad, he insisted that “humanity holds in its hands the opportunity to further freedom’s triumph” over war, terror, tyrants, poverty, and disease.<sup>335</sup> “The United States welcomes our responsibility to lead in this great mission.”<sup>336</sup>

### *B. Executive Competence*

The neoconservatives who precipitated the second Iraq war displayed little apprehension about the use of U.S. military power. America’s commitment of armed forces abroad was unlikely to be abusive, they argued, because “American foreign policy is infused with an unusually high degree of morality.”<sup>337</sup> Abu Ghraib showed otherwise, as did subsequent investigations of the prison scandal that have protected the high-level officials—military and civilian—who authorized abusive interrogation techniques. Why did conservatives, traditionally distrustful of human nature and, in the past, supportive of limited government and the need for checks and balances, display such unwavering confidence in the national government, the use of military force, the idea of nation-building, and the exercise of presidential power?

Neoconservatives originally developed as sharp critics of liberals who advocated overblown and unrealistic social programs. During the period of the 1960s and 1970s, neoconservatives wrote incisive and thoughtful studies that warned about “the dangers of ambitious social engineering, and how social planners could never control behavior or deal with unanticipated consequences.”<sup>338</sup> Given that skepticism and academic training, how could neoconservatives, in backing the Iraq War, “expect to bring democracy to a part of the world that has stubbornly resisted it and is virulently anti-American to boot?”<sup>339</sup> In preparing for war—or in fact *not* preparing for war—the neoconservatives combined the always dangerous mix of ignorance and arrogance. Their presumption (and it was no more than that) that Iraqis would respond to America’s invasion as a liberation, not an occupation, was one of many analytical blunders.

Distrust of executive war power has a constitutional base: the Framers’ fear that presidents would use military power for personal or partisan motivations, not for the national interest. There is a second reason to distrust executive war power. It comes from America’s political experience. The second Iraq War underscores what should have been learned from the Korean and Vietnam Wars: the limited competence within the executive branch to plan and execute a successful war. Miscalculations, errors of intelligence, and false statements have haunted the second Iraq War. The mistakes

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333. *Id.* at 1–2.

334. *Id.* at 3.

335. *Id.*

336. *Id.*

337. Kristol & Kagan, *supra* note 326, at 22.

338. Francis Fukuyama, *The Neoconservative Moment*, THE NAT’L INT., Summer 2004, at 60.

339. *Id.*

came not from the military but from civilian leadership, especially at the level of the White House, the Department of Justice, and the Department of Defense.

On November 10, 2005, National Security Adviser Stephen Hadley objected to press accounts “that somehow the administration manipulated prewar intelligence about Iraq.”<sup>340</sup> He said that administration statements “about the threat posed by Saddam Hussein were based on the aggregation of intelligence from a number of sources, and represented the collective view of the intelligence community. Those judgments were shared by Republicans and Democrats alike.”<sup>341</sup> He pointed out that seventy-seven Senators, representing both parties, “all believed, based on the same intelligence, that Saddam Hussein had weapons of mass destruction and imposed an enormous threat to his neighbors and to the world at large.”<sup>342</sup> Critics of the administration who “ignore their own past statements” about the existence of WMDs “expose[] the hollowness of their current attacks.”<sup>343</sup> Hadley insisted that the intelligence relied on before going to war against Iraq “was clear in terms of the weapons of mass destruction.”<sup>344</sup>

That is false. The intelligence about WMDs was far from clear, nor is it true that lawmakers had the “same intelligence” as the executive branch. Before voting on the Iraq Resolution in October 2002, members of Congress asked the administration to prepare a National Intelligence Estimate (NIE) on Iraq. The intelligence agencies responded by producing a report on WMDs. To Hadley, the case that was brought to President Bush, “in terms of the NIE, and parts of which have been made public, was a very strong case.”<sup>345</sup> The unclassified version of the NIE, available on the CIA’s Web site,<sup>346</sup> was extremely misleading. The second sentence of the “key judgments” section, which forms the opening paragraphs of the NIE, stated unequivocally that “Baghdad has chemical and biological weapons.”<sup>347</sup> When the reader turns to the analytical sections that follow, however, *nothing* supports that flat and powerful assertion. Instead, Iraq was merely said to have “the ability” to produce chemical warfare agents and “the capability” to produce biological warfare agents.<sup>348</sup> None of those cautious and highly qualified statements justified the unqualified claim by President Bush that Iraq “has stockpiled chemical and biological weapons.”<sup>349</sup>

When President Bush addressed the nation on October 7, 2002, shortly before lawmakers prepared to vote on the Iraq Resolution, he said that Iraq “was required to

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340. Stephen J. Hadley, Nat’l Sec. Advisor, Press Briefing at the James S. Brady Press Briefing Room (Nov. 10, 2005), available at <http://www.whitehouse.gov/news/releases/2005/11/print/20051110-7.html>.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* For newspaper coverage of Hadley’s comments, see Peter Baker, *Bush Aide Fires Back at Critics on Justification for War in Iraq*, WASH. POST, Nov. 11, 2005, at A1; Dana Milbank and Walter Pincus, *Asterisks Dot White House’s Iraq Argument*, WASH. POST, Nov. 12, 2005, at A1.

346. The CIA Web site is available at <http://www.cia.gov>.

347. Fisher, *supra* note 95, at 408.

348. *Id.*

349. *Id.*

destroy its weapons of mass destruction, to cease all development of such weapons,” and yet the Iraqi regime, he claimed, “has violated all of those obligations.”<sup>350</sup> That was false. Inspections after the war began the following spring demonstrated conclusively that the WMDs had been destroyed and had not been replaced. Bush said flatly on October 7, 2002, that Iraq “possesses and produces chemical and biological weapons.”<sup>351</sup> This is another false statement, reflecting the misleading assertion that had been included in the NIE. What the Bush administration did in mobilizing public and congressional support for military action against Iraq was to concentrate on what might be, or could be, or used to be, rather than on what actually existed.<sup>352</sup>

A day after Hadley’s press briefing in 2005, President Bush gave a Veterans Day speech in Pennsylvania. He said that “it’s perfectly legitimate to criticize my decision” to go to war against Iraq, but “it is deeply irresponsible to rewrite the history of how that war began. Some Democrats and anti-war critics are now claiming we manipulated the intelligence and misled the American people about why we went to war.”<sup>353</sup> The stakes in the war on terrorism “are too high,” he said, “and the national interest is too important, for politicians to throw out false charges. These baseless attacks send the wrong signal to our troops and to an enemy that is questioning America’s will.”<sup>354</sup> False charges have indeed been made, especially the assertions that Iraq possessed chemical and biological weapons at the time America invaded.

Vice President Dick Cheney also rebuked the critics of the Iraq War. On November 16, 2005, at a dinner sponsored by a conservative research organization, he said that the accusation that the Bush administration distorted intelligence to justify war against Iraq represented “one of the most dishonest and reprehensible charges ever aired in this city.”<sup>355</sup> The morale of U.S. troops could be undermined by those who suggest “they were sent into battle for a lie.”<sup>356</sup> He added, with some resignation: “The president and I cannot prevent certain politicians from losing their memory, or their backbone.”<sup>357</sup>

In a speech delivered November 21, 2005, Cheney warned that those who argue that Americans were sent into battle based on a lie are engaging in “revisionism of the most corrupt and shameless variety.”<sup>358</sup> While admitting that, in hindsight, U.S. intelligence was flawed, “any suggestion that prewar information was distorted, hyped or fabricated

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350. Address to the Nation on Iraq from Cincinnati, Ohio, 38 WEEKLY COMP. PRES. DOC. 1716 (Oct. 14, 2004).

351. *Id.*

352. See Fisher, *supra* note 95.

353. President George W. Bush, Speech at Tobyhanna Army Depot Commemorating Veterans Day (Nov. 11, 2005), available at <http://www.whitehouse.gov/news/releases/2005/11/print/20051111-1.html>.

354. *Id.*; see also Richard W. Stevenson, *Bush Contends Partisan Critics Hurt War Effort*, N.Y. TIMES, Nov. 11, 2005, at A1; Linton Weeks and Peter Baker, *Bush Spars With Critics of the War*, WASH. POST, Nov. 11, 2005, at A1.

355. Michael A. Fletcher, *Bush, Cheney Denounce Democratic Senators Critical of Iraq War*, WASH. POST, Nov. 17, 2005, at A8.

356. *Id.*

357. *Id.*; see also Michael A. Fletcher, *Iraq Critics Meet Familiar Reply*, WASH. POST, Nov. 18, 2005, at A6.

358. Elisabeth Bumiller, *Cheney Sees ‘Shameless’ Revisionism on War*, N.Y. TIMES, Nov. 22, 2005, at A1.

by the leader of the nation is utterly false.”<sup>359</sup> There should be no question that the prewar information was distorted, hyped, and fabricated. The October 2002 NIE prepared by the intelligence community is plain evidence of that, and Bush repeated those false claims in his Cincinnati speech. Cheney’s speech, however, is carefully nuanced. U.S. citizens have become accustomed to reading and rereading every administration statement. Cheney’s speech did not, on its face, reject the notion that prewar information was distorted, hyped, or fabricated. He merely rejected the claim that such errors were done *by the leader of the nation*. Was the Cincinnati speech distorted, hyped, or fabricated? Yes, but perhaps Cheney could argue that Bush merely repeated CIA information that itself was distorted, hyped, or fabricated. The remarkable fact about U.S. intelligence used to justify the war against Iraq was not that some of it was false. Every country has gone to war on the basis of intelligence that was partly true and partly false. The second Iraq War is unique in that *every single bit of intelligence* used to justify military action was false. Whether it was the assertion that a link existed between Iraq and al Qaeda, or that Iraq purchased aluminum tubes to enrich uranium for the purpose of reconstituting its nuclear weapons program, or that Iraq tried to buy uranium oxide (yellowcake) from a country in Africa, or that Iraq possessed chemical and biological weapons, or that it had mobile labs to produce germ warfare agents, or that it had unmanned aerial vehicles (drones) to disperse biological warfare agents—every single one of these claims was false.<sup>360</sup>

When Secretary of State Colin Powell appeared before the U.N. Security Council on February 5, 2003, to make the case for war against Iraq, he said that “every statement I make today is backed up by sources, solid sources. These are not assertions. What we’re giving you are facts and conclusions based on solid intelligence.”<sup>361</sup> What he gave, however, were not facts but assertions, and false assertions at that. After learning that his detailed description of Iraqi weapons programs turned out to be based on false information, he now regards his performance at the Security Council to be a permanent “blot” on his record of public service.<sup>362</sup>

#### CONCLUSION

The second Iraq War is a reminder of how much we have ignored the Framers’ concerns about the war power, the constitutional text, early judicial decisions, and such misguided military conflicts as the Korean and Vietnam Wars. The Framers valued deliberation, a republican form of government, and popular control. From their study of history, the Framers had good reason to distrust executive wars. We have more than good reason. We have the Framers’ understanding about political principles plus the experience of presidential wars that have been tragically misconceived and executed.

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359. *Id.*; see also Michael A. Fletcher and Jim Vandehei, *Cheney Again Assails Critics of War*, WASH. POST, Nov. 22, 2005, at A1; Dana Milbank, *Opening the Door to Debate, and Then Shutting It*, WASH. POST, Nov. 22, 2005, at A4.

360. See Louis Fisher, *Justifying War Against Iraq*, in *RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS* 289–313 (James A. Thurber ed., 3d ed. 2005).

361. *Powell’s Address, Presenting ‘Deeply Troubling’ Evidence on Iraq*, N.Y. TIMES, Feb. 6, 2003, at A14.

362. Steven R. Weisman, *Powell Calls His U.N. Speech A Lasting Blot on His Record*, N.Y. TIMES, Sept. 9, 2005, at A10.



Various administrations, Republican and Democratic, have lied their way into wars and displayed incompetence about the conduct of war. Once again an administration, this time in Iraq, has opted for military force without understanding its limits or its consequences. There is no possibility for spreading democracy abroad if there is no respect and understanding for it in the United States.

Congressional debate on the Iraq Resolution of October 2002 has eerie parallels to the Gulf of Tonkin Resolution of August 1964. Both resolutions transferred to the President the sole decision-making authority to go to war and determine its scope and duration. Both resolutions were based on false information. Both occurred in the middle of an election year: a presidential election in 1964 and congressional elections in 2002. Both Presidents—a Democrat in 1964 and a Republican in 2002—used military operations in an effort to enhance their party's electoral chances. In each case, lawmakers chose to trust in the President rather than in themselves. Senator Chuck Hagel (R-Neb.) regards the Vietnam War as a national tragedy “partly because members of Congress failed their country, remained silent and lacked the courage to challenge the administrations in power until it was too late.”<sup>363</sup> How many times does it take to learn the same lesson?

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363. Glenn Kessler, *Hagel Defends Criticisms of Iraq Policy*, WASH. POST, Nov. 16, 2005, at A6.